83-1229

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

RICHARD JOHN LONGSTAFF,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

1. Whether an admission by petitioner of homosexual activity is statutorily and constitutionally sufficient to support a finding that, pursuant to Title 8, Section 1182(a)(4), petitioner was excludable on medical grounds at the time of his entry in the absence of a Public Health Service medical examination and certification as required by Congress in Title 8, Section 1224.

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No.

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OCTOBER TERM, 1983

RICHARD JOHN LONGSTAFF,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner Richard John Longstaff respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 28, 1983.

OPINIONS BELOW

The opinions of the United States District Court, the United States Court of Appeals, and the findings of fact by the designated naturalization examiner, are listed below in chronological order and set out in the Appendix:

April 29, 1977	Petition of Longstaff, Misc. No. 1261, Petition No. 11,248, Memorandum of Designated Naturalization Examiner in Support of Recommendation for Dismissal of Petition for Naturalization.

April 19, 1978	Petition of Longstaff, Misc. No. 1261, Petition No. 11,248, A 14 533 708, Findings of Fact, Conclusions of Law, and Recommendation of the Designated Naturalization Examiner
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October 27, 1983	Matter of Longstaff, No. 82-1218, Fifth Circuit Order Denying Rehearing En Banc.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on September 28, 1983. A timely petition for rehearing *en banc* was denied on October 27, 1983 and this petition for certiorari was filed on or before January 25, 1984, within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions noted below are set out in full in the Appendix.

U.S. Constitution, Article 1, Section 8, Clause 4

U.S. Constitution, Amendment V

8 U.S.C. § 1101(a)(20);
8 U.S.C. § 1182(a)(1) through (7);
8 U.S.C. § 1201(d);
8 U.S.C. § 1222;
8 U.S.C. § 1224;
8 U.S.C. § 1225;
8 U.S.C. § 1226;
8 U.S.C. § 1251(a)(1);
8 U.S.C. § 1427; and
8 U.S.C. § 1429

Section 16, Act of February 5, 1917, 39 Stat. 885

STATEMENT OF THE CASE

This case involves the denial of a petition for naturalization of an alien, resident in this country for eighteen years. The petition was denied on the ground that the alien was excludable at the time of his entry into the United States. The sole issue is whether petitioner's admission of homosexual activity, occurring prior to his 1965 entry into the United States, is legally sufficient to support a finding that petitioner was exludable on medical grounds under Title 8, Section 1182(a)(4) at the time of his entry in the absence of the Public Health Service medical examination and certification required by Congress in Title 8, Section 1224.

Richard John Longstaff is a native and citizen of the United Kingdom. On November 14, 1965, he was admitted to the United States with a valid immigrant visa as a permanent resident.

As the Court below acknowledged:

"There is no evidence that, when he sought a visa eighteen

> years ago, he was asked any question that would indicate to him or to any other intelligent layman that his sexual preferences might affect the issuance of a visa, or that he knowingly gave a false answer to any question asked of him. In the eighteen years of his residence, he has led a constructive life" (*Matter of Longstaff* (5 Cir. 1983) 716 F.2d 1439, 1451).

A medical examination conducted by the Public Health Service (hereinafter "PHS") at the time of his entry did not result in the issuance of a medical certificate of noneligibility.[1] He has not been subjected to further medical examination by the PHS.

On October 13, 1977, petitioner filed a petition for naturalization as a citizen of the United States in the United States District Court for the Northern District of Texas. During the course of preliminary questioning by Immigration and Naturalization Service (hereinafter "INS") officials in conjunction with this petition, Longstaff stated that he had engaged in homosexual activity in England prior to his 1965 entry. Approval of his petition was recommended by the naturalization examiner, but the District Court denied naturalization on the ground, inter alia, that Longstaff had failed to meet his burden of establishing good moral character (8 U.S.C. § 1427(a)(3) (1976)) as required by the Immigration and Nationality Act (hereinafter "The Act"). The Court of Appeals affirmed (*In Re Longstaff*, No. 79-2241 (5 Cir. Oct. 31, 1980) (per curiam) (unpublished opinion)). In response to a petition for rehearing,

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[1] The Court below noted:

"Before he arrived in the United States, Longstaff filled out a form entitled 'Application for Immigrant Visa and Alien Registration.' To the question:

> 3(b) Are you now or have you ever been afflicted with psychopathic personality, epilepsy, mental defect, fits, fainting spells, convulsions or a nervous breakdown?

Longstaff answered, 'No.'

* * * * *

However, no evidence suggests that Longstaff knew or had reason to know that 'psychopathic personality' was a medical term of art that included homosexuals and consequently excluded them from admission to the United States" (716 F.2d 1440).

however, the Court below remanded to afford Longstaff an opportunity to produce additional evidence of good moral character (*In re Longstaff*, No. 79-2241 (5 Cir. Dec. 11, 1980) (on rehearing) (unpublished opinion)).

Pursuant to the District Court's pretrial order on remand, an examiner for the INS interrogated Longstaff. The examiner concluded that Longstaff had met his burden of establishing good moral character. Nevertheless, denial of the petition was recommended because of Longstaff's admission that he had engaged in homosexual activity prior to entering the United States in 1965. The examiner concluded from this admission that Longstaff was "homosexual" at the time of his original entry and, therefore, had not been "lawfully admitted," as the Act requires for naturalization. After a trial de novo, the District Court again denied Longstaff's petition for naturalization (*In Re Longstaff* (N.D. Texas 1982) 538 F.Supp. 589).

The Court below affirmed (one judge dissenting) on the sole ground that "[b]ased on the finding that Longstaff was a homosexual when he entered the United States the district court correctly decided that he was then excludable, that his excludability may now be proved, and that, being excludable, he may not be naturalized" (Matter of Longstaff, *supra* 716 F.2d 1439, 1451). A petition for rehearing *en banc* was denied on October 27, 1983 (see Appendix p. A61).

JURISDICTION OF THE COURT OF FIRST INSTANCE

Jurisdiction to naturalize persons as citizens of the United States is conferred upon the United States District Courts pursuant to Title 8, Section 1421. Accordingly, the United States District Court for the Northern District of Texas had jurisdiction over petitioner's petition for naturalization.

SUMMARY OF ARGUMENT

The issue presented in this case is whether an admission by petitioner of homosexual activity is statutorily and constitutionally sufficien. to support a finding that, pursuant to Title 8, Section 1182(a)(4), petitioner was excludable on medical grounds at the time of his entry in the absence of a Public Health Service medical examination and certification as required by Congress in Title 8, Section 1224. In *Hill* v. *INS* (9

Cir. 1983) 714 F.2d 1470, the United States Court of Appeals for the Ninth Circuit held that an admission of homosexual activity is insufficient and that a medical examination and certification is required by Title 8, Section 1224, before an alien can be excluded pursuant to Title 8, Section 1182(a)(4). Petitioner asserts that the opinion of the Ninth Circuit is correct and fully consistent with the legislative history of the Act, prior uniform administrative interpretation, precedential decisions of this Court and of other courts and administrative bodies.

In contrast, the decision below of the United States Court of Appeals for the Fifth Circuit is plainly erroneous and deviates from congressional intent, administrative interpretation and all precedents when it holds that a medical examination is not necessary for the exclusion of an alien pursuant to a medical ground of excludability. Moreover, the decision of the Court below would construe the Act so as to violate petitioner's right to due process of law as guaranteed by the Fifth Amendment of the United States Constitution.

Further, this petition should be granted to insure a uniform national standard for determining which aliens shall be excluded pursuant to the medical grounds for exclusion.

REASONS FOR GRANTING THE WRIT

1. ***The decision below conflicts with a recent decision of the Court of Appeals for the Ninth Circuit and earlier decisions of this Court as to the proper interpretation of Title 8, Sections 1182(a)(4) and 1224.***

The Act provides that certain classes of aliens shall be excluded from admission into the United States (8 U.S.C. § 1182(a)). The first seven of thirty-three subparagraphs of Section 1182(a) describe mental and physical conditions requiring exclusion of an alien from the United States. The pertinent provision in this case calls for excluding persons "afflicted with psychopathic personality or sexual deviation or a mental defect" (8 U.S.C. § 1182(a)(4)).

In *Boutilier* v. *Immigration and Naturalization Service* (1967) 387 U.S. 118, this Court held that Congress intended the phrase "psychopathic personality" in Section 1182(a)(4) "to include homosexuals *such as petitioner*" (emphasis added) (387 U.S. at 120). It must be made clear at the outset, however, that this Court found in *Boutilier* that "the Government clearly established that petitioner was a homosexual at entry" (387 U.S. at 122) by compliance with the mandated procedure, that is, the introduction into evidence of a Class A medical certificate issued by PHS medical officers that petitioner "was afflicted with a Class A condition, namely, psychopathic personality, sexual deviate ***" (387 U.S. at 120). Petitioner does not question the substantive issue of whether Congress intended to exclude homosexual aliens such as Boutilier under Section 1182(a)(4). Rather, petitioner asserts that Congress mandated a procedure for determining whether aliens are subject to Section 1182(a)(4), a procedure from which the court below erroneously permitted the INS to depart.

The procedure mandated by Congress for determining the existence of these mental and physical disabilities requires examination and certification by PHS medical officers; appeal of certification of the existence of a medical condition requiring exclusion is limited to review by a panel of medical officers; and the PHS medical certification is conclusive on the hearing officer as to the issue of the existence of a medical ground of exclusion (8 U.S.C. §§ 1224, 1225, 1226).

Accordingly, prior to the decision below, it was firmly established that under Section 1182(a)(4) exclusions of an allegedly homosexual alien were based exclusively on medical findings by PHS physicians that were subject to review only by a board of PHS medical officers in accordance with procedural safeguards carefully mandated by Congress (8 U.S.C. §§ 1222, 1224, 1225 and 1226; see *Hill* v. *INS* (9 Cir. 1983) 714 F.2d 1470).

No medical certification that petitioner was excludable under Section 1182(a)(4) was provided to INS in 1965 or to the District Court at the trial in 1982. The decision below correctly acknowledged that "the procedural protections built into the exclusion process demonstrate Congress' intent that only competent evidence of medical excludability be adduced in exclusion proceedings" (716 F.2d 1448). Yet it reasoned that these protections (including PHS examination and certification) are properly dispensed with "if the alien admits the facts determining his excludability * * *" (716 F.2d 1449). Thus, it held that the *non-medical, entirely judicial finding* that petitioner was "homosexual" at the time of his 1965 entry made that entry an unlawful one, disqualifying him for naturalization and subjecting him to deportation. This result was supported by the assertion that the Act "does not expressly forbid an immigration judge to find an applicant excludable on the basis of evidence other than a medical certificate" (716 F.2d at 1448).[2]

Acknowledging that its holding is in direct conflict with a decision rendered by the Court of Appeals for the Ninth Circuit on September 7, 1983 (*Hill* v. *INS*, supra, 714 F.2d 1470),[3] the majority opinion adopted the view that the general congressional intent to exclude "homosexuals" authorized INS to deviate from the specific medical certification procedures required by

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[2] If the Act is construed in accordance with the holding of the Fifth Circuit, petitioner submits that the Act would then be unconstitutional in that the statutory terms "psychopathic personality" and "sexual deviation" as applied to aliens by untrained lay personnel would be so vague, ambiguous and overly broad as to invite arbitrary and discriminatory imposition of sanctions in violation of the Fifth Amendment's Due Process clause. The purpose of the "void for vagueness" doctrine is to prevent governmental agencies from exercising unbridled discretion in the imposition of criminal and civil penalties (*Grayned* v. *City of Rockford* (1972) 408 U.S. 104, 108-109). The Fifth Circuit's holding would not only permit such "unbridled discretion," it would promote it.

[3] The majority opinion below also acknowledges that its decision is in conflict with *In re Labady* (S.D.N.Y. 1971) 326 F.Supp. 924 and an alternative holding by Court of Appeals for the Second Circuit in *Kovacs* v. *United States* (2 Cir. 1973) 476 F.2d 843. The Government has acknowledged the conflict in its petition for rehearing in *Hill* v. *Ins* (9 Cir. 1983) 714 F.2d 1470, which was denied by an order dated January 17, 1984.

Congress when an alien "admits" his or her homosexuality.[4] The Court below reasoned as follows:

> "To remand the case for a medical determination of homosexuality would appear to be to ask for a certification of the obvious. It is patent that sexual preference cannot be determined by blood test or physical examination; even doctors must reach a decision by interrogation of the person involved or of others professing knowledge about that person. To require the INS to disregard *the most reliable source of information*, the statements of the person involved, would be to substitute *secondary evidence* for primary" (emphasis added) (716 F.2d at 1448).

The Ninth Circuit, on the other hand, took the opposite view, holding that the INS has no authority to adopt regulations or procedures that dispense with the statutory scheme requiring a professional medical opinion. In its view, the congressional intent:

> " * * * to require a medical examination and certification of all aliens excluded on medical grounds [is] apparent on the face of the statute, corroborated by the legislative history, and supported by an unbroken string of administrative and judicial decisions" (*Hill* v. *INS*, supra, 714 F.2d 1470, 1480).

The Court found:

> "*** no indication in the legislative history that Congress or the PHS believed that homosexuality should be determined by admissions any more than schizophrenia could be self-diagnosed" (id. at 1476).

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[4] In addition, the decision below conflicts directly with *Boutilier* v. *Immigration and Naturalization Service* (2 Cir. 1966) 363 F.2d 488, 492, reversed on other grounds, *Boutilier* v. *Immigration and Naturalization Service*, *supra*, 387 U.S. 118 (actual medical examination required for exclusion); *United States ex. rel. Wulf* v. *Esperdy* (2 Cir. 1960) 277 F.2d 537 (medical certificate is conclusive on issue of excludability); *and In re Hollinger*, (E.D.Mich. 1962) 211 F.Supp. 203, 206 ("The *only* evidence upon which a finding of insanity can be made for the purpose of an exlusion proceeding is a certification under 8 U.S.C. § 1224 by a medical officer * * *").

Rejecting the view of the court below that medical opinion was mere "secondary evidence," the Ninth Circuit held that:

> "The reasons for adhering to the Act's requirements of a medical examination and certification of the results are even stronger where the evidence relied upon is the medically untrained alien's opinion of himself" (ibid).

Accordingly, it held that medical certification is a statutory prerequisite to a finding of excludability under Section 1182(a)(4).

The Ninth Circuit relied for its holding upon *United States ex rel. Johnson* v. *Shaughnessy* (1949) 336 U.S. 806, a decision that is clearly contrary to the Fifth Circuit's theory that medical certification is "secondary evidence" that can be dispensed with when there is an "admission." This Court held in *Shaughnessy* that an alien could not be excluded for "mental defect" without a valid medical examination, construing Section 16 of the 1917 Act (which is substantially identical to Section 1224 of the current Act) as making the medical examination and certification an indispensable part of the exclusion process:

> "The importance of these medical certificates is underscored by our holding that Congress has made the findings and conclusions in the certificates final on the question of whether an alien is so mentally defective that admission into the country must be denied. Congress has taken note of the crucial importance of this medical determination by prescribing certain minimum procedural requirements that the Public Health Service must follow, such as special qualifications of examining doctors, the minimum number of doctors that must examine the applying alien, and the right of an alien to have an initial adverse certificate reviewed by a special board of doctors. In order that further safeguards might be provided, Congress authorized the Surgeon General of the Public Health Service to prescribe additional regulations [continued by 8 U.S.C. § 1224 of the current Act] governing the procedure to be observed in the exercise of that Service's *exclusive authority over medical questions.*

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> "Congress has provided that *before* aliens suspected of mental defects are excluded, findings and conclusions shall be made by Public Health doctors *based on their own examinations* made in compliance with procedural safeguards defined or authorized by Congress" (emphasis added) (336 U.S. at 809-10, 814).

The decision below simply rejects these procedural safeguards and the "crucial importance of this medical determination" so as not to require "certification of the obvious." Congress required these procedural protections to assure that what is obvious to the INS is also the medical truth.

The decision below rationalizes its assumption that a medical certificate of non-eligibility would have issued in 1965 on the ground that medical examination and certification of petitioner under Section 1182(a)(4) is not practicable at present.[5] The Ninth Circuit, on the other hand, took the position that it is for Congress, not INS or the courts, to resolve this interagency dispute or, perhaps, to provide the INS with alternative methods of identification and classification of those it seeks to exclude other than through medical diagnosis and certification. Judge Tate, dissenting from the decision below, observed:

> "It is basic, however, that this court is without authority to ignore the mandate of Congress' statutory scheme merely because there is an interagency dispute over the mechanics of statutory enforcement. If this administrative dispute renders the exclusion of homosexuals under the statute ineffective, then it is for Congress, not this court, to alter its statutory scheme requiring medical certification. Absent such congressional intervention, I am unwilling to infer that Congress intended to allow the non-medical personnel of an administrative agency to use 'medical' classifications—as it is the practice in present-day Russia—to exile persons for newly-discovered mental defects or other 'medical conditions'" (716 F.2d at 1453).

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[5] On August 2, 1979, rejecting the opinion of the Office of Legal Counsel, the Surgeon General of the United States directed that PHS Medical personnel were no longer to issue certificates solely because an alien is suspected of being homosexual (716 F.2d 1444, n. 21).

2. *The decision below raises significant and recurring problems in the interpretation and administration of a uniform immigration and naturalization policy.*

The United States Constitution mandates a uniform rule of naturalization (Art. I, Sec. 8, Cl. 4). Effective administration of the immigration and naturalization matters requires a uniform rule regulating exclusion and deportation proceedings (*Nemetz* v. *INS* (4 Cir. 1981) 647 F.2d 432). The conflict between the Courts of Appeals for the Fifth and Ninth Circuits makes such uniformity impossible. Further, the novel approach adopted by the Court below effects a "serious hinderance to effective administration of the law" that warrants the grant of certiorari (*Rothensies* v. *Electric Storage Battery Co.* (1946) 329 U.S. 296).

Within the confines of the territorial jurisdiction of the Fifth Circuit, rules and regulations governing the administration of all medical grounds for exclusion will have to be formulated in the absence of any congressional direction. Aliens resident in the Fifth Circuit can be subjected to deportation proceedings or denial of naturalization on the ground that their original entry was unlawful if there is an accusation that they were "homosexual," or afflicted with any of the other "diseases" or "mental conditions" enumerated in Section 1182(a)(1-7) at the time of entry. Such determinations can then be made in the absence of procedural safeguards that were carefully and deliberately prescribed by Congress for professional medical examination and certification. Similarly, aliens entering the United States as tourists can be labeled "homosexual," "insane," or "mentally retarded," without the medical certification required by the Act and can be excluded from this country if they arrive at a port of entry located within the Fifth Circuit. On the other hand, of course, those aliens residing in the Ninth Circuit or those alien visitors who arrive at a port of entry in the jurisdiction of that Court, are free from the specter of untrained lay personnel making medical determinations effecting significant rights and privileges.

Until and unless this Court acts to remove the anomaly created by the Fifth Circuit's unprecedented rejection of the

congressionally-mandated scheme for determining exclusion on medical grounds, sensible and uniform administration of the Act will be impossible.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court below.

Respectfully submitted,

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Appendix

JOSEPH McELROY, JR., CLERK

By_____
Deputy

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF TEXAS

PETITION FOR NATURALIZATION of RICHARD JOHN LONGSTAFF	**MISC. NO. 1261** **PETITION NO. 11,248** **A14 533 708**

MEMORANDUM IN SUPPORT OF RECOMMENDATION FOR DISMISSAL OF PETITION FOR NATURALIZATION

The petitioner herein was born June 25, 1939 in Cambridge, England. He was lawfully admitted for permanent residence on November 14, 1965, and now resides at 4320 Cole Avenue, Apartment No. 3, in Dallas, Texas. He filed his petition in this court on January 13, 1977.

On March 31, 1977, at a continued preliminary examination, the petitioner, while under oath, admitted that he had committed a homosexual act during the last 12 months. Upon further questioning by the Designated Naturalization Examiner, about this issue, the petitioner herein refused to answer any further questions pertaining to that issue. He has repeatedly stated since that time that he will answer no questions regarding homosexual conduct.

The petitioner was reminded that: (a) as a petitioner for naturalization, he has a burden of establishing good moral character (8 U.S.C. 1427(e); (b) homosexual conduct is a crime in the State of Texas (Section 21.06 of the Texas Penal

Code); and (c) that by refusing to answer questions relevant to his moral character, he was not properly prosecuting his petition.

In view of the above facts, it is respectfully moved, by the undersigned, that the above-numbered petition for naturalization be dismissed on the grounds that the petitioner named herein has not properly pursued his petition, by refusing to permit adequate inquiry by the Naturalization Examiner, as to his qualifications for admission to United States citizenship.

KENDALL WARREN
Designated Naturalization Examiner

Date: April 29, 1977

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
APR 19 1978
JOSEPH McELROY, JR., Clerk
By _____
Deputy

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS

PETITION FOR NATURALIZATION of RICHARD JOHN LONGSTAFF	MISC. NO. 1261 PETITION NO. 11,248 A14 533 708

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION OF THE DESIGNATED NATURALIZATION EXAMINER

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS:

1. The undersigned, duly designated under the Immigration and Nationality Act to conduct preliminary examinations upon petitions for naturalization, respectfully submits that the above-named petitioner, a native and national of England, age 38 years, who has resided continuously in the United States since his lawful admission for permanent residence on November 14, 1965, filed the petition for naturalization above referred to on January 13, 1977 under Section 316(a) of the Immigration and Nationality Act (8 U.S.C. 1427(a)).

The question presented is whether the petitioner has established good moral character during the period required by

law, that is, since January 13, 1972, the question arising by reason of the fact that since that date, the petitioner has participated in homosexual acts.

2. On January 13, 1977, the petitioner was accorded a preliminary investigation under oath prior to the filing of the petition for naturalization during which he orally testified that he has had homosexual experiences.

A further preliminary examination (Ex. 1) was conducted on March 31, 1977. He testified that he has had homosexual experiences; that he was aware of the fact that it is against the law to have homosexual acts in Texas; that such a law is a "total unreasonable law" and that he did not regard homosexuality as anything illegal and that what he did in his bedroom should be his right; that he would not disregard a law, but that this law was an exception, this particular law because it is totally unreasonable and one cannot live by it; that in his own conscience he did not believe that he had broken the law.

3. Section 316(f) of the Immigration and Nationality Act (8 U.S.C. 1427(a)) provides that "No person shall be naturalized unless such petitioner . . .(3) all the period referred to in this subsection has been and still is a person of good moral character."

Section 101(f) of the Immigration and Nationality Act (8 U.S.C. 1101(f)) lists eight categories of conduct which preclude a finding of good moral character. Subsection (3) thereof, by reference to Section 212(a)(9) of the Act (8 U.S.C. 1182), expands these classes to aliens convicted of a crime involving moral turpitude or who admits acts constituting essential elements of such crime. An omnibus clause to Section 8 thereof states: "The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character."

Under Section 101(f)(3) of the Act, referring to Section 212(a)(9) thereof, the Congress set the yardstick by which to measure the moral character of a candidate for citizenship. The petitioner who has been convicted of a crime involving moral turpitude or who admits the commission of such crime during

the statutory period fails to measure up to the moral character required by Section 316(a) of the Immigration and Nationality Act.

The criteria of good moral character is generally accepted to be conduct which measures up to the average citizen of the community. *In re Mogus,* 77 F. Supp. 150 (1947). The question of good moral character is one of fact, *Daddona* v. *U.S.*, 170 F.2d 964 (1948), and the burden of proving good moral character rests with the petitioner. Good moral character is not a static term since the standards of the community often change with time. *Johnson* v. *U.S.*, 186 F.2d 588 (1951).

The petitioner has admitted that he has committed homosexual acts. The Texas Penal Code, Section 21.06, defines homosexual conduct as deviate sexual intercourse with another individual of the same sex. Such conduct in the state of Texas is punishable upon conviction as a Class "C" misdemeanor. It is the existence of this criminal statue that gives rise to an issue in this case.

A thorough investigation as contemplated by Section 335 of the Act (8 U.S.C. 1446) has been conducted in this case. The petitioner has never been convicted for any offense nor has he been arrested for any. All of those persons reached by the Investigating Officer spoke well for the petitioner. Nothing of a derogatory nature was disclosed.

The petitioner's homosexual acts have not involved minors. There has been no use of threat or fraud, or the taking or giving of money or anything of value or the act of solicitation thereof in a public place. The homosexual acts have been entered into with the consent of the adult parties.

Homosexual conduct as it affects good moral character has been the subject of increasingly judicial interpretation in recent years. The decisions themselves offer an enlightening observation of changing public opinions, the decriminalization in many jurisdictions of homosexual acts, and indeed whether inquiries into private conduct is proper especially when such private conduct is not harmful to others.

Naturalization was granted in *In re Petition for Naturalization of Manual Labady,* 326 F. Supp. 924 (USDC, SD, NY 1971). Like the present case, *Labady* had never been arrested and his conduct had in no way been harmful to others. The court applied as a test whether or not the conduct had been public (posing a threat to others) or private. The court concluded that where the conduct was private, even though violative of the personal moral code "of most of us", it was not the proper concern of Section 1427 (Section 316). At the time, there was a sodomy statute in New York and the court discussed whether it extended to private acts. The court pointed out (at top, page 929) that at most, it was a Class "B" misdemeanor "and would not necessarily preclude a finding of good moral character within the meaning of Section 1427(a)."

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Naturalization was denied in *Kovacs* v. *United States,* 476 F.2d 843 (1973). However, the petition was denied not because of *Kovacs* homosexual activity, but because he did not testify truthfully during the proceedings. *Kovacs* had listed on his application three arrests, two of which were related to homosexual activities. He conceded the arrest incidents but denied being a homosexual. Evidence, in the form of a prior sworn statement by *Kovacs,* was introduced. The earlier statement indicated a large number of homosexual acts and a medical evaluation. He admitted the statement but denied the description of the activities contained in it. The court denied naturalization solely on the basis of the petitioner's lack of candor and that this lack of candor had come up short of the burden carried by petitioner to show his qualifications for

naturalization. *Kovacs* was heard in the same court which had earlier decided *Labady*. *Kovacs* made no reference to existing criminal statutes in New York at the time as did the court in *Labady*.

The petition at hand must be measured against the three cases cited above. *Brodie* is similar in that the petitioner admits to conduct in private with no public effects and no harm to others. *Brodie* can be distinguished in that the conduct was no longer criminal in nature in Oregon. *Labady* is similar in that the petitioner admits to such conduct in private. It is similar also in that in both *Labady* and the case at hand, the jurisdictions had (have) criminal penalties classified as misdemeanors. *Kovacs* is similar in that there is a common element of lack of candor, however, it should be noted that in *Kovacs*, the petitioner had three prior arrests and had given a prior sworn statement (later essentially denied) which was the basis for "lack of candor". Thus, the situation in *Kovacs* was somewhat more aggravated than that in the present case. There was no prior record in this case and the issue arose solely through exchanges in preliminary proceedings.

Increasingly, the courts have questioned the propriety of inquiries into persons' sexual habits provided, of course, that those habits or practices do not reach into the public domain. See *Labady*, supra. The cases cited above indicate further that while homosexual activity offends most of us, there is developing among the populace at least a tolerance of it. The test is whether the conduct is private and unoffensive to others or whether it is public. The court in *Labady* even pointed out that such conduct in private, though violative of the personal moral code of most of us was not the proper concern of Section 316 of the Act.

The court in *Labady* granted naturalization where a criminal statute was still on the books. Even if the petitioner came within the statute, the court pointed out, the offense would hardly be enough on which to base a denial recommendation. The *Brodie* court was aware of the *Labady* decision. One can wonder, therefore, if the recent decriminalization of certain homosexual activities in Oregon was a determining factor. It

could easily be said that the *Brodie* court was not granting naturalization solely because the criminal penalties had been removed. Rather, it appears the court called attention to that fact and recent city council resolutions to point out, as stated in key note (8) of the decision that "... the community regards homosexual behavior between consenting adults with tolerance, if not indifference."

Viewed in relation to the three cases cited above, the petitioner's situation seems most similar to *Labady*. The conduct was private in both instances. The petitioners' records were both otherwise good. Misdemeanor offenses by statute existed in both jurisdictions.

The evidence supports the position that being a homosexual in and of itself does not preclude a petitioner from showing good moral character and, therefore, the petitioner is not ineligible for United States citizenship under Section 316(a) of the Immigration and Nationality Act (8 U.S.C. 1427(a)).

Finally, of very recent interest is the decision of the Supreme Court of Florida: *Florida Board of Bar Examiners re: Eimers, Robert Francis,* Case No. 51,154, March 2, 1978. In the case, the issue was whether Mr. Eimers possessed the character qualifications for admission to the bar of Florida. The court stated that the acknowledgement of a homosexual preference was not, in and of itself, a failure to meet the "good moral character" standard of admission. Generally, the court stated that homosexual status is not a barring factor absent other and adverse circumstances. Additionally, the court stated that disciplinary actions against members of the bar should take place only when there was "a substantial connection" between private behavior and the ability to carry out professional responsibilities. A copy of the decision of the Supreme Court of Florida is attached.

The case cited just above has relevance here. The full inquiry conducted into the qualifications of this petitioner has not revealed adverse factors which would preclude his discharge of the obligations and responsibilities of United States citizenship.

4. Pursuant to the provisions of Section 335 of the Immigration and Nationality Act (8 U.S.C. 1446), I hereby make the following findings of fact and conclusions of law:

FINDINGS OF FACT:

(a) That the petitioner is an alien lawfully admitted for permanent residence on November 14, 1965 and filed his petition for naturalization on January 13, 1977.

(b) That the petitioner had admitted that he has participated in homosexual acts;

(c) That the above acts, in and of themselves, are not deemed to be immoral by the ordinary man and woman in the community.

CONCLUSIONS OF LAW:

(a) That the petitioner is not precluded from naturalization under Section 101(f)(3) (8 U.S.C. 1101(f)) referring to Section 212(a)(9) (8 U.S.C. 1182) of the Immigration and Nationality Act (8 U.S.C. 1427(a));

(b) That the petitioner has met the burden of proving that he is a person of good moral character as required under Section 316(a) of the Immigration and Nationality Act (8 U.S.C. 1427(a));

(c) That the petitioner is eligible, therefore, for citizenship under 316(a) of the Immigration and Nationality Act (8 U.S.C. 1427(a)).

5. I recommend, therefore, that this petition for naturalization be GRANTED and that all the facts as hereinabove set forth be presented to the Court.

Respectfully submitted,

JAMES A. CURRY
Designated Naturalization Examiner

Date: 4-17-78

U. S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
MAR 9 1979
JOSEPH McELROY, JR., Clerk
By _____
Deputy

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

IN RE: PETITION FOR NATURALIZATION OF RICHARD JOHN LONGSTAFF	PETITION NO. 11,248

On this day came on to be heard the Petition for Naturalization of Richard John Longstaff for admission to United States citizenship. The petitioner appeared in person. Lee B. Reinfeld and James A. Curry and Charles D. Cabaniss, Assistant United States Attorney, appeared for the United States Immigration and Naturalization Service. The Court having duly considered the Petition of Richard John Longstaff; the transcript of the preliminary examination of Petitioner on March 31, 1977, conducted by Kendall Warren, Designated Naturalization Examiner; Examiner Warren's Memorandum in Support of Recommendation for Dismissal of Petition for Naturalization filed in this Court on April 29, 1977; the Findings of Fact, Conclusions of Law and Recommendation of Designated Naturalization Examiner James A. Curry, filed herein on April 19, 1978; and the evidence and argument presented at this hearing, the Court finds, for the reasons stated below, that such Petition should be denied:

1. That the Petitioner, Richard John Longstaff, has participated in homosexual conduct in Texas, a crime under § 21.06 of the Texas Penal Code;

2. That on his preliminary examination, Petitioner prevented the proper processing of his petition by refusal to answer questions relevant to his moral character; that on his preliminary examination and in Court Petitioner claimed the right of privacy and exhibited a lack of candor;

3. Congress regulates the admission of aliens by the inherent attributes of sovereignty. Dumbauld, *Constitution*, 142. *Chinese Exclusion Case*, 130 U. S. 581, 603, 609 (1889); *Fong Yue Ting* v. *United States*, 149 U. S. 698, 707 (1893). Accordingly, the applicant has the burden of proving that he has complied with the statutory requirements, including that of establishing good moral character. 8 U.S.C. § 1427(a). Petitioner has failed to discharge this burden.

The Petition for Naturalization of Richard John Longstaff is, therefore, DENIED.

SIGNED and ORDERED ENTERED this 9th day of March, 1979.

UNITED STATES DISTRICT JUDGE

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

UNIT A

No. 79-2241

PETITION FOR NATURALIZATION OF
RICHARD JOHN LONGSTAFF,
Petitioner.

Appeal from the United States District Court for the Northern District of Texas

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(OCTOBER 31, 1980)

Before COLEMAN, Chief Judge, RUBIN and WILLIAMS, Circuit Judges.

PER CURIAM:

This appeal from the denial of the application for naturalization of a resident alien who admitted having homosexual relations presents us with an invitation to explore and define the statutory requirement of "good moral character." 8 U.S.C. § 1427(a)(3). However, because we find it unnecessary for the decision of this case to discuss this and other fundamental issues that might affect our decision were the record before us different, we reject the invitation. Having carefully examined that short record, we conclude that Longstaff, the applicant, did not adduce evidence sufficient to meet his burden of showing that he is of good moral character and we, therefore, affirm the decision of the trial judge solely on that basis.

Longstaff is a forty-year-old male citizen of the United Kingdom who entered the United States as a lawful permanent resident in 1965. Ten years later, after he had become a successful businessman, he filed an application for naturalization. In that application, he stated, inter alia, that he had never committed an offense or crime for which he had not been arrested.

At his initial preliminary examination, he said he had had "some homosexual experience." At his second preliminary examination, Longstaff repeated this statement and added that the most recent such experience had occurred "approximately three months before." He refused to give details about his homosexual experiences or how often or how many times during the last five years they had occurred. The INS conducted an investigation into Longstaff's moral character and found that he enjoyed a good reputation among his neighbors and business associates and that he operated a successful retail business.

Before being granted the privilege of United States citizenship, a resident alien must prove, inter alia, that he is of "good moral character." 8 U.S.C. § 1427(a)(3). A person lacks good moral character if he admits to a commission of a crime, or the essential elements of a crime, that involves "moral turpitude." 8 U.S.C. § 1101(f)(3), § 1182(a)(9).

A Texas statute, Texas Penal Code § 21.06, punishes as a misdemeanor deviate sexual intercourse, which is defined as "contact between the genitals of one person and the mouth or anus of another person." Texas Penal Code § 21.01(1). Longstaff refused to explain why he did not believe that his homosexual conduct had violated this law or to say whether his homosexual experiences had occurred outside the state of Texas.

After the second examination, on April 29, 1977, one of the INS examiners filed a memorandum with the district court recommending that Longstaff's petition for naturalization be dismissed. After further extensive investigation, however, another examiner filed a recommendation urging that his petition for naturalization be granted.

At the naturalization hearing, no witnesses were called and no additional evidence was presented. The district judge reviewed the transcript of the INS preliminary examination, questioned the applicant briefly, although Longstaff was not under oath, and denied the petition on the grounds that Longstaff had participated in homosexual conduct in Texas which was a crime under state law; had "prevented the proper processing of his petition" by refusing to answer certain questions relevant to his moral character; had exhibited a "lack of candor" during the preliminary examination and in court; and, finally, had failed to discharge his burden of establishing good moral character.

We affirm on the sole but sufficient ground that Longstaff failed to carry the burden of establishing his good moral character. While the INS report was ultimately favorable, the facts it recited raised reasonable doubts in the district judge's mind and it was then the applicant's burden to resolve them. The short record presented for our review is devoid of the facts necessary to determine whether Longstaff had, in fact, violated the Texas statute and of any evidence that might assist in determining whether that statute defines a crime involving moral turpitude. In the absence of evidence on these matters, we are not prepared to find error in the trial judge's conclusion that Longstaff had not carried his statutory burden.

We need not now decide whether the standard for the evaluation of moral turpitude is that of the community or of the state in which the applicant resides or is determined nationwide. No evidence to establish any of these was offered. We decline to interpret further the statutory standards without an adequate factual record. Finally, in view of the conclusion we have reached, we deem it unnecessary to review the additional reasons advanced by the district judge for denial of the petition.

Accordingly, the judgment denying the petition is AFFIRMED without prejudice to the filing of a new petition.

U.S. COURT OF APPEALS
FILED
DEC 11 1980
GILBERT F. GANUCHEAU, Clerk

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 79-2241

PETITION FOR NATURALIZATION OF
RICHARD JOHN LONGSTAFF,
Petitioner.

Appeal From the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING

(DECEMBER 11, 1980)

Before COLEMAN, Chief Judge, RUBIN and WILLIAMS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby granted, on the representation that the respondent supports the request.

ENTERED FOR THE COURT:

/s/ ALVIN J. RUBIN
United States Circuit Judge

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT
UNIT A

No. 79-2241

PETITION FOR NATURALIZATION OF
RICHARD JOHN LONGSTAFF,
Petitioner.

**Appeal From The United States District Court
For The Northern District Of Texas**

JUDGMENT ON PETITION FOR REHEARING

Before COLEMAN, Chief Judge, RUBIN and WILLIAMS, Circuit Judges.

This cause came on to be heard on Petition for Rehearing.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the Petition for Rehearing is GRANTED, the judgment of this Court of October 31, 1980, is hereby modified to provide that the judgment of the District Court is affirmed but with cause remanded to the District Court for the purpose of allowing petitioner-appellant the opportunity to correct the deficiencies in the record by means of a trial de novo and the submission of such further evidence as will be necessary to establish his good moral character, as required by law.

Entered December 11, 1980

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF TEXAS

PETITION FOR NATURALIZATION of RICHARD JOHN LONGSTAFF	PETITION NO. 11,248 A14 533 708

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION OF THE DESIGNATED NATURALIZATION EXAMINER

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS:

1. The undersigned, duly designated under Section 335(b) of the Immigration and Nationality Act (8 USC 1446(b)) to conduct preliminary examinations upon petitions for Naturalization, respectfully submits that the above named petitioner, a native and national of Great Britain, age 42 years, who has resided continuously in the United States since his alleged lawful admission for permanent residence on November 14, 1965, filed the Petition for Naturalization above referred to on January 13, 1977 under Section 316(a) of the Immigration and Nationality Act (8 USC 1427(a)).

On March 31, 1977, petitioner was examined under oath before a representative of the Immigration and Naturalization Service (hereinafter called the Service). The recorded testimony was the basis for a Service recommendation dated April 29, 1977 that the petition be dismissed. On February 23, 1979, a written motion was made to this Court by the Service to withdraw the recommendation. The recommendation and motion were never acted upon (See District Court Hearing transcript of March 9, 1979) and it is believed that subsequent Court Orders have now made them moot.

On March 9, 1979 this Court held a hearing on the petition and thereafter on the same date denied the petition on the grounds that the petitioner failed to discharge his burden of establishing good moral character, notwithstanding a recommendation by the Service that the petition be granted. The petitioner appealed. On October 31, 1980, the Fifth Circuit affirmed solely on the basis that the petitioner "did not adduce evidence sufficient to meet his burden of showing that he is of good moral character."

On November 13, 1980, naturalization petitioner Longstaff petitioned the Fifth Circuit for a rehearing. The rehearing petition, unopposed by the Service and the Government, was granted and by judgment issued as mandate on February 12, 1981, the Circuit Court modified its judgment of October 31, 1981, affirming the judgment of this court, but "with cause remanded to the District Court for the purpose of allowing petitioner appellant the opportunity to correct the deficiencies in the record by means of a trial de novo and the submission of such further evidence as will be necessary to establish his good moral character, as required by law."

On December 1, 1981 this court held a Pretrial Conference and subsequently ordered the Service to re-examine the petitioner, certain enumerated records and directed the Service to file its report and recommendation. It is believed that this present Findings of Fact, Conclusions of Law, and Recommendation of the Designated Naturalization Examiner fulfills the Court Order and is consistent with the Rules of Civil Procedure for the United States District Courts, Rule 1, "to secure the just, speedy, and inexpensive determination of every action", and Rule 81 as it relates to "proceedings for admission to citizenship."

Up to this time, this case has revolved around the pivotal issue of whether the petitioner can establish good moral character because of his admitted natural affinity for homosexual activity. Although this issue will be discussed in depth, a further issue will also be discussed.

The issues posed in this case are whether the petitioner has established good moral character during the period required by

Section 316(a) of the Immigration and Nationality Act (8 USC 1427(a)); and whether he has established a lawful admission for permanent residence in the United States as required by Section 318 of the Immigration and Nationality Act (8 USC 1429); both issues arising because of the petitioner's homosexual activity.

2. On January 4, 1982, the petitioner was questioned by the undersigned in a Preliminary Examination (Exhibit 1) during which time his Application to File Petition for Naturalization was introduced into evidence (Exhibit 1(a)); his Immigrant Visa and Alien Registration and Application for Immigrant Visa and Alien Registration was introduced into evidence (Exhibit 1(b)); and the preliminary examination of March 31, 1977 was introduced into evidence (Exhibit 1(c)).

During the January 4, 1982 examination, the Texas Class C misdemeanor Penal Code dealing with homosexual conduct and deviate sexual intercourse was read into the record. (Exhibit 1, pages 4 and 5). The petitioner admitted knowing these laws; admitting his violation of them in Texas at least a dozen times since 1977, the last time being approximately six weeks ago and four weeks before that; and that he has always been a homosexual from birth. (Ex. 1, page 8 and 9).

He testified that his answer to the question on the application to File Petition for Naturalization (Exhibit 1(a), page 2, question 6(a)) that is "knowingly committed any crime for which you have not been arrested" would now be "yes" (Exhibit 1, page 4); that he answered "no" in 1977 and declined to answer certain questions (Exhibit 1(c)) because he felt his privacy was at stake but he did not intend to deceive because he felt he had not broken any laws; that it is a technicality; that he is not a criminal (Exhibit 1, page 11 and 14).

He testified that his homosexual acts, as defined by the Texas Criminal Code, did not involve minors; did not come as a result of threat or fraud, did not take place because of the taking or giving of money, anything of value, or because of an act of solicitation by him in a public place; did not take place in

a public place; and were between consenting adults in a private accommodation (Exhibit 1, pages 11 and 12).

He testified that the Immigrant Visa and Alien Registration (Exhibit 1(b)) relates to him; that he served in the Royal Air Force in England from 1957 to 1960; that he committed homosexual activity while a member of this Force; that he committed homosexual activity before he came to the United States on November 14, 1965; but that he did not come to the United States to engage in immoral sexual acts, prostitution, or other unlawful commercialized vice (Exhibit 1, pages 4, 9, 10, and 12).

He testified that since 1977 he has not left the United States (Exhibit 1, page 6) but before that he made 8 or 9 trips outside the United States, the longest being for 8 days (Exhibit 1, page 6; Exhibit 1(a), page 1, question 4).

3. Section 316(a) of the Immigration and Nationality Act (8 USC 1427(a)) provides that "No person shall be naturalized unless such petitioner . . . (3) during all the period referred to in this subsection has been and still is a person of good moral character."

Section 101(f) of the Immigration and Nationality Act (8 USC 1101(f)) lists eight categories of conduct which preclude a finding of good moral character. Subsection (3) thereof, by reference to Section 212(a)(9) of the Act (8 USC 1182), expands these classes to aliens convicted of a crime involving moral turpitude or who admits acts constituting essential elements of such crime. An omnibus clause to Section 8 thereof states; "The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character."

Under Section 101(f)(3) of the Act, referring to Section 212(a)(9) thereof, the Congress set the yardstick by which to measure the moral character of a candidate for citizenship. The petitioner who has been convicted of a crime involving moral turpitude or who admits the commission of such crime during the statutory period fails to measure up to the moral character required by Section 316(a) of the Immigration and Nationality Act.

The criteria of good moral character is generally accepted to be conduct which measures up to the average citizen of the community. *In re Mogus*, 77 F. Supp. 150 (1947). The question of good moral character is one of fact *Daddona* v. *U.S.*, 170 F.2d 964 (1948), and the burden of proving good moral character rests with the petitioner. Good moral character is not a static term since the standards of the community often change with time. *Johnson* v. *U.S.*, 186 F.2d 588 (1951).

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A thorough investigation as contemplated by Section 335 of the Act (8 USC 1446) has been conducted in this case. The petitioner has never been convicted for any offense nor has he been arrested for any. All of those persons reached by the Investigating Officer spoke well for the petitioner. Nothing of a derogatory nature was disclosed.

The petitioner's homosexual acts have not involved minors. There has been no use of threat or fraud, or the taking or giving of money or anything of value or the act of solicitation thereof in a public place. The homosexual acts have been entered into with the consent of the adult parties.

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court applied as a test whether or not the conduct had been public (posing a threat to others) or private. The court concluded that where the conduct was private, even though violative of the personal moral code "of most of us", it was not the proper concern of Section 1427 (Section 316). At the time, there was a sodomy statute in New York and the court discussed whether it extended to private acts. The court pointed out (at top, page 929) that at most, it was a Class "B" misdemeanor "and would not necessarily preclude a finding of good moral character within the meaning of Section 1427(a)."

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As seen, reliance on State law in viewing a person's sexual conduct has created many inconsistencies in naturalization proceedings from court to court. Recently, on April 24, 1981, the United States Court of Appeals for the Fourth Circuit handed down a decision which reversed the lower court's decision and granted United States citizenship to the petitioner, an admitted homosexual, *Nemetz* v. *Immigration and Naturalization Service,* No. 80-1289, USCA 4th Cir. (1981). The issue involved was whether it is appropriate to look to State laws to determine the issue of good moral character in naturalization matters. Nemetz argued that the United States Constitution requires a "uniform rule of naturalization", U. S. Const. art. I S 8, cl. 4. Because reference to state law yields differing results from state to state, he contended that it is improper to define "moral turpitude" in those terms. The court agreed.

The petition at hand must be measured against the cases cited above. *Brodie* is similar in that the petitioner admits to conduct in private with no public effects and no harm to others. *Brodie* can be distinguished in that the conduct was no longer criminal in nature in Oregon. *Labady* is similar in that the petitioner admits to such conduct in private. It is similar also in that in both *Labady* and the case at hand, the jurisdictions had (have) criminal penalties classified as misdemeanors. *Kovacs* is similar in that there is a common element of lack of candor, however, it should be noted that in *Kovacs,* the petitioner had three prior arrests and had given a prior sworn statement (later essentially denied) which was the basis for "lack of candor". Thus, the situation in *Kovacs* was somewhat more aggravated than that in the present case. There was no prior record in this case and the issue arose solely through exchanges in preliminary proceedings.

Increasingly, the courts have questioned the propriety of inquiries into a person's sexual habits provided, of course, that those habits or practices do not reach into the public domain. See *Labady,* supra. The cases cited above indicate further that while homosexual activity offends most of us, there is developing among the populace at least a tolerance of it. The test is whether the conduct is private and unoffensive to others or

whether it is public. The court in *Labady* even pointed out that such conduct in private, though violative of the personal moral code of most of us was not the proper concern of Section 316 of the Act.

The court in *Labady* granted naturalization where a criminal statute was still on the books. Even if the petitioner came within the statute, the court pointed out, the offense would hardly be enough on which to base a denial recommendation. The *Brodie* court was aware of the *Labady* decision. One can wonder, therefore, if the recent decriminalization of certain homosexual activities in Oregon was a determining factor. It could easily be said that the *Brodie* court was not granting naturalization solely because the criminal penalties had been removed. Rather, it appears the court called attention to that fact and recent city council resolutions to point out, as stated in key note (8) of the decision that " . . . the community regards homosexual behavior between consenting adults with tolerance, if not indifference."

Lastly, the court in *Nemetz* granted naturalization to a self admitted homosexual, a resident of the State of Virginia where sodomy is defined as a crime involving moral turpitude. The court held that when the use of a State law defeats the Constitutional requirement of a uniform rule of naturalization, the appropriate test is whether the act is harmful to the public or is offensive merely to personal morality, with only those acts harmful to the public being a bar to a finding of good moral character.

The petitioner's candid testimony regarding homosexual activity before entering the United States is the basis for the other issue posed in this case, i.e. whether he has established a lawful admission for permanent residence in the United States as required by Section 318 of the Immigration and Nationality Act (8 USC 1429) which reads as follows:

> "*Sec. 318.* Except as otherwise provided in this title, no person shall be naturalized unless he has been lawfully admitted to the United States for permanent residence in accordance with all applicable provisions of this Act. The burden of proof shall be upon such person to show that he

entered the United States lawfully, and the time, place, and manner of such entry into the United States, but in presenting such proof he shall be entitled to the production of his immigrant visa, if any, or of other entry document, if any, and of any other documents and records, not considered by the Attorney General to be confidential, pertaining to such entry in the custody of the Service. Notwithstanding the provisions of section 405(b), and except as provided in sections 328 and 329 no person shall be naturalized against whom there is outstanding a final finding of deportation pursuant to a warrant of arrest issued under the provisions of this or any other Act; and no petition for naturalization shall be finally heard by a naturalization court if there is pending against the petitioner a deportation proceeding pursuant to a warrant of arrest issued under the provisions of this or any other Act: *Provided* That the findings of the Attorney General in terminating deportation proceedings or in suspending the deportation of an alien pursuant to the provisions of this Act, shall not be deemed binding in any way upon the naturalization court with respect to the question of whether such person has established his eligibility for naturalization as required by this title."

There is no warrant of arrest or other deportation proceedings pending against the petitioner. Compare *In Re Labady*, supra.

Section 212(a)(4) of the Immigration and Nationality Act (8 USC 1182(a)(4)) precludes the issuance of a visa to an alien "... afflicted with psychopathic personality or sexual deviation ..." Section 241(a)(1) of the Immigration and Nationality Act (8 USC 1251(a)(1)) provides for the deportation of any alien who "at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry." Page 3, Question 3(b) of Exhibit 1(b) reflects that at the time the petitioner applied for and was granted his visa in 1965, the term "psychopathic personality" was used in the law (although the petitioner answered "no" in response to the question).

The particular term and derivatives thereof, as it relates to homosexuality, has been the subject of administrative and legal litigation in deportation and exclusion proceedings, *Boutilier* v. *I&N Service,* 363 F.2d 488 (1966), 387 US 118; *Matter of LaRochelle,* 11 I&N Dec. 436 (1965); *Matter of Lavoie,* 11 I&N Dec. 224 (1965) and 12 I&N Dec. 821 (1968); *Matter of Hill,* Board of Immigration Appeals Interim Decision #2873(advance sheet)(July 9, 1981) where it was held that an applicant for admission can be excluded from the United States as a homosexual absent a U.S. Public Health Service Class "A" Certification where he has made an unsolicited unambiguous admission that he is a homosexual and where the current U.S. Public Health Service position that homosexuality cannot be medically diagnosed is a matter of record.

The present naturalization proceeding is not the proper forum for deportation proceedings. *In Re Terzich's Petition, 256 F.2d 197 (1958); Duenas* v. *United States,* 330 F.2d 726 (1964). However, because of the petitioner's admission of homosexual conduct before he entered the United States in 1965, there is sufficient evidence as a matter of law to cast doubt whether the petitioner has established his burden of proving a lawful admission for permanent residence. It is well established in naturalization proceedings that doubts should be resolved in favor of the United States and against the claimant. *Berenyi* v. *Immigration Service,* 385 U.S. 630; *United States* v. *Macintosh,* 283 U.S. 605.

4. Pursuant to the provisions of Section 335 of the Immigration and Nationality Act (8 USC 1446), I hereby make the following findings of fact and conclusions of law:

FINDINGS OF FACT;

(a) That the petitioner is an alien admitted for permanent residence on November 14, 1965 and filed his petition for naturalization on January 13, 1977.

(b) That the petitioner has admitted participation in homosexual acts in the State of Texas;

(c) That the above acts, in and of themselves, are not deemed to be immoral by the ordinary man and woman in the community.

(d) That the petitioner has admitted participation in homosexual acts prior to his admission to the United States in 1965.

CONCLUSIONS OF LAW:

(a) That the petitioner is not precluded from naturalization under Section 101(1)(3) (8 USC 1101(f)) referring to Section 212(a)(9) (8 USC 1182) of the Immigration and Nationality Act (8 USC 1427(a));

(b) That the petitioner has met the burden of proving that he is a person of good moral character as required under Section 316(a) of the Immigration and Nationality Act (8 USC 1427(a));

(c) That the petitioner has not met the burden of proving that he entered the United States lawfully as required under Section 318 of the Immigration and Nationality Act (8 USC 1429);

(d) That the petitioner is not eligible, therefore, for citizenship under 316(a) of the Immigration and Nationality Act (8 USC 1427(a)).

5. I recommend, therefore, that this petition for naturalization be DENIED.

Lee B. Reinfeld
Designated Naturalization Examiner

Date

U. S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
MAR 25 1982
JOSEPH McELROY, JR., Clerk
By _____
Deputy

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

IN RE:
PETITION FOR NATURALIZATION OF
RICHARD JOHN LONGSTAFF

**MISC. NO. 1261
PETITION NO. 11248**

MEMORANDUM OF DECISION

This is a naturalization case before the Court on remand for a hearing de novo. The Court of Appeals for the Fifth Circuit affirmed the judgment of this Court entered March 9, 1979 denying Petitioner Richard John Longstaff naturalization on the gound that Petitioner had failed to discharge his burden of proving that he "has complied with the statutory requirements, including that of establishing good moral character. 8 U.S.C. § 1427(a), (e)." However, this hearing de novo allows Petitioner an opportunity to discharge his burden.

Congress naturalizes aliens as an inherent attribute of sovereignty. "... [N]aturalization is a privilege accorded only to particular categories of qualified persons after they have undergone a careful screening procedure and taken the oath of allegiance in solemn judicial ceremonies. * * * Congress can also exclude aliens from the United States, and regulate the terms of their admission, by virtue of the commerce power and the inherent attributes of sovereignty." Dumbauld, *The Constitution of the United States*, 141-142 (1964).

The majority opinion by Justice Clark for the Supreme Court in *Boutilier* v. *Immigration and Naturalization Serv.*, 387 U.S. 118, 123-124, 87 S.Ct. 1563, 1567 (1967),* stated:

> . . . It has long been held that Congress has plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden. See The Chinese Exclusion Case (Chae Chan Ping v. United States), 130 U.S. 581, 9 S.Ct. 623, 32 L.Ed. 1068 (1889). . . . Congress commanded that homosexuals not be allowed to enter.

Petitioner Richard John Longstaff is a 42-year old English immigrant who has resided continuously in the United States since his entry on November 14, 1965. Petitioner is an owner of two combination clothing/hair dressing businesses in Dallas and Houston. He applied for citizenship on September 19, 1975. On January 13, 1977 he was interviewed by James C. Curry, an Immigration and Naturalization Service (INS) officer. During this interview Petitioner was asked whether he had ever had any homosexual experiences. At first Petitioner denied such, explaining in a later preliminary examination that he did not feel Mr. Curry had the right to ask that question. Petitioner later admitted to Mr. Curry that he had had some homosexual experience. [Exhibit 1(c), Warren Examination, p. 9] In a preliminary examination with INS Examiner Kendall Warren, Petitioner refused to say how many homosexual experiences he had had in the last five years and refused to say how often or to give the details of the homosexual experiences he had had. [Ex. 1(c), pp. 11 and 10, respectively] Petitioner was asked why he failed to note his homosexual experiences as previously committed crimes in his 1975 Application to File Petition for Naturalization, and he answered to the effect that Texas law violations had nothing to do with these proceedings. [Ex. 1(c), pp. 12-13]

On remand, the trial court ordered a second preliminary examination. At this second examination before INS Examiner Lee Reinfeld, Petitioner Longstaff admitted that he was a homosexual and had been since birth. [Ex. 1, Reinfeld

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* Justices Douglas, Brennan and Fortas, dissenting.

Examination, p. 9] Petitioner admitted to several violations of the Texas Penal Code § 21.06. [Ex. 1, p. 8] He also stated that he had committed homosexual acts before his entry into the United States. [Ex. 1, pp. 9-10] Mr. Reinfeld's recommendation filed with the court on January 28, 1982, was that the Petition be denied because Petitioner had not lawfully entered this country. Petitioner's counsel objected to consideration of the issue relating to lawful entry. In this Court's Pretrial Order of February 9, 1982, the Court instructed counsel that the pretrial order prepared by counsel should contain *inter alia* "a list of additional matters which will aid in the disposition of the proceeding." In the Pretrial Order submitted by counsel on March 8, 1982, the Government included the issue of unlawful entry. Obviously this issue was relevant and proper.

Although Petitioner admitted he had engaged in homosexual conduct before his entry into the United States in November, 1965, on his Application for Immigration Visa and Alien Registration [Exhibit 1(b)], he answered "No" to question 3(b) which read: "Are you now or have you ever been afflicted with psychopathic personality . . . ?"

Petitioner called two witnesses who testified as to his good moral character and reputation in the community. A member of the Dallas City Council and a teaching consultant testified they had known Petitioner two and four years, respectively, and that he was a person of good moral character and was as moral as the average citizen in Dallas and that Petitioner's homosexuality did not change their opinion.

Petitioner has not met his burden of proof that he has been lawfully admitted for permanent residence. 8 U.S.C. § 1427(a).

> ". . . [N]o person shall be naturalized *unless* he has been *lawfully admitted to the United States* for permanent residence in accordance with all applicable provisions of this chapter. The burden of proof shall be upon such person to show that he entered the United States lawfully . . ." 8 U.S.C. § 1429 (Emphasis supplied)

8 U.S.C. § 1182(a) provides that: "... the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States." Paragraph (4) of § 1182(a) designates as such a class "aliens afflicted with psychopathic personality, or sexual deviation, ..." In 1965, at the time of Petitioner's entry, the class was designated simply as "aliens afflicted with psychopathic personality." The term "psychopathic personality" includes homosexuals and did so in 1965 when Petitioner entered the country. *Boutilier* v. *Immigration and Naturalization Serv., supra,* affirming Judge Kaufman's opinion, 363 F.2d 488 (2 Cir. 1966). Judge Kaufman's opinion states: "... [t]he clear design of Congress was to exclude homosexuals from entry into the country and this it has done in section 212(a)(4) [8 U.S.C. § 1182(a)(4)] by the use of the words 'psychopathic personality.'" *Id.,* pp. 495-496. "... Congress utilized the phrase 'psychopathic personality' not as a medical or psychiatric formulation but as a legal term of art designed to preclude the admission of homosexual aliens into the United States." *Id.,* p. 494. In affirming that opinion the Supreme Court added: "... Congress commanded that homosexuals not be allowed to enter." *Boutilier, supra,* 387 U.S. 118, 124, 87 S.Ct. 1563, 1567. Here, as in *Boutilier,* the Petitioner was afflicted with psychopathic personality a long period of time prior to his entry into the United States.

Petitioner falls not only into the category of excludable aliens with psychopathic personality under § 1182(a)(4) but also under § 1182(a)(9) because Petitioner commited sodomy in England before his entry, and sodomy has been recognized as a crime involving moral turpitude. Cf. *Velez-Lozano* v. *INS,* 463 F.2d 1305 (D.C. Cir. 1972).

Petitioner's counsel argue that because he was admitted to the United States in 1965 on a visa issued by an American consul in London and examined, he should not now be denied naturalization. However, we hold that an administrative decision of the Immigration and Naturalization Service does not preclude the clear intent of Congress to exclude homosexuals and that as such Petitioner did not lawfully enter the

United States. *Matter of Hill,* Board of Immigration Appeals Interim Decision #2873 (advance sheet) (July 9, 1981). See *Boutilier* v. *INS, supra,* 387 U.S. 118, 120, 87 S.Ct. 1563, 1565 (1967).

Petitioner has the burden of proving his good moral character as required by 8 U.S.C. § 1427(e). Petitioner has not met his burden due to his violations of the Texas Penal Code[1] which provides:

> § 21.06: Homosexual Conduct—"A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex."
>
> § 21.01. "Deviate sexual intercourse means any contact between any part of the genitals of one person and the mouth or anus of another person."

An offense under § 21.06 is a Class C Misdemeanor, punishable by a $200 fine. §12.23.

The Texas courts have held that the crime of homosexual conduct, § 21.06, is a crime involving moral turpitude. Such conduct is "... contrary to the accepted and customary behavior between man and man and is contrary to the rule of decency and good morals." *Smith* v. *State,* 490 S.W.2d 902, 907 (Tex.Civ.App.—Corpus Christi 1972, *writ ref. n.r.e.*), 523 S.W.2d 1, (Tex.Civ.App.—Corpus Christi 1975, *writ ref. n.r.e.*). The citizens of Texas have long regarded the crime of homosexual conduct or sodomy, as it is commonly and historically referred to, to be immoral. See *Pruett* v. *State,* 463 S.W.2d 191, 195-196 at fn. 9 (Tex.Crim. App. 1970), *appeal dismissed, Pruett* v. *State,* 402 U.S. 902 (1971), *reh. den.* 403 U.S. 912 (1971). As recent as 1980 a Texas Court ruled it slanderous *per se* where the defendant referred to the appellant as a "queer" or "homosexual." *Head* v. *Newton,* 596 S.W.2d 209 (Tex.Civ.App.—Houston 14th 1980, no writ). Texas recognizes as slander "... [malicious] ... words imputing a criminal offense involving moral turpitude...." see *Sparkman* v. *Peoples Nat. Bank of Tyler,* 580 S.W.2d 868, 869 (Tex.Civ.App.—Texarkana 1979, *writ ref. n.r.e.*).

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[1] The case of *Nemetz* v. *Immigration and Naturalization Service,* 647 F.2d 432 (4 Cir. 1981) held that it was inappropriate to look at state law to determine the issue of good moral character in naturalization matters and that the United States Constitution requires a "uniform rule of naturalization," U.S. Const. art. I, § 8, cl. 4. We do not disagree with the idea of a uniform rule. Rather, we hold the uniform rule is, as prescribed in 8 U.S.C. § 1427(a), that of "good moral character."

Petitioner's admission of a crime involving moral turpitude puts petitioner squarely within a category of persons who by statutory definition cannot be regarded as persons of good moral character under §§ 1427(a) and 1101(f)(3).

§ 1101(f)(3) provides: "For purposes of this chapter—

"No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was—

"(3) a member of one . . . of the classes of persons . . . described in . . . paragraph (9) . . . of section 1182(a) . . . ."

§ 1182(a)(9) provides:

"Aliens who have been convicted of a crime involving moral turpitude . . . or aliens who *admit having committed such a crime* . . . ." [Emphasis supplied][2]

The Court finds fault in still another aspect of Petitioner's character. Petitioner exhibited on several occasions before the INS and the Court a lack of candor.[3] Only after Petitioner had lost his case on appeal and returned to this court a second time did he decide to be forthright about his homosexual conduct, a subject in which the United States of America and this court certainly have an interest.

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[2] *Ramirez* v. *INS*, 413 F.2d 405 (D.C. Cir. 1969), *cert. den.*, 396 U.S. 928, 90 S.Ct. 264, 24 L.ed 2d 226 (1969), upheld moral turpitude statute, 8 U.S.C. § 1182(a)(9), as not being void for vagueness.

[3] Petitioner stated in his Application to File Petition for Naturalization that he had never committed a crime for which he had not been arrested. [Ex. 1(a), p. 2, Ques. 6(a); Ex. 1(c), p. 8]

(b) When interviewed by INS Examiner James Curry, Petitioner at first denied having had homosexual experiences; but, later, answered Curry by saying he had had some experience. [Ex. 1(c), pp. 9, 10]

(c) In the interview with INS Examiner Kendall Warren, Petitioner was asked when was the first time he had had a homosexual experience, and Petitioner said he didn't know. [Exhibit 1(c), pp. 9, 10]

(d) During Mr. Warren's preliminary examination, several questions were put to Petitioner regarding the frequency of his homosexual conduct, and Petitioner refused to answer. [Exhibit 1(c), pp. 10-12]

(Footnote continued on following page)

"Acquisition of American citizenship is a solemn affair. Full and truthful response to all relevant questions required by the naturalization procedure is, of course, to be exacted, and temporizing with the truth must be vigorously discouraged. Failure to give frank, honest, and unequivocal answers to the court when one seeks naturalization is a serious matter. Complete replies are essential so that the qualifications of the applicant or his lack of them may be ascertained. Suppressed or concealed facts, if known, might in and of themselves justify denial of citizenship." *Chant* v. *United States*, 364 U.S. 350, 352-353, 5 L.ed 2d 120, 81 S.Ct. 147 (1960).

In conclusion, it is clear that Petitioner Longstaff was not lawfully admitted into the United States and that he has not sustained his burden of proving that he was a person of good moral character; and his Petition for Naturalization should be and it is hereby DENIED.

SIGNED and ORDERED ENTERED this 23 day of March, 1982.

UNITED STATES
DISTRICT JUDGE

(Footnote continued from previous page)

(e) Petitioner knew of the Texas criminal statute § 21.06, proscribing homosexual conduct and acknowledged such in a letter to Congressman Jim Maddox. [Ex. 1(c), pp. 11-12; Ex. 1, p. 4]

(f) However, Petitioner, in the Warren examination, was unwilling to explain why his actions were not a violation of the Texas law. [Ex. 1(c), pp. 13-16]

(g) Nor was Petitioner willing to explain his conduct before the Court, prefacing his testimony with the statement, "I didn't want it to come out." "I don't think anyone really has the right to ask these kinds of questions . . ." Petitioner was evasive about whether his homosexual acts had occurred outside of Texas. [Tr. Mar. 9, 1979 Hearing, pp. 11-14.]

(h) After Petitioner's appeal to the Fifth Circuit, after affirmance, and upon remand of this case, Petitioner in a second examination before the INS, still failed to respond with regard to his answer to Question #6 on his Application to File Petition for Naturalization. Rather, Petitioner's attorney, in a structured response, testified that since Petitioner had become familiar with the exact wording of the Texas statute, he would now answer "yes" to the question of whether he had ever committed a crime for which he had not been arrested." [Ex. 1, p. 4]

(i) Petitioner admitted to INS Examiner Lee Reinfeld that he was in violation of § 21.06 of the Texas Penal Code. [Ex. 1, pp. 3-5, 8]

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 82-1218

IN THE MATTER OF:

PETITION FOR NATURALIZATION OF
RICHARD JOHN LONGSTAFF,

Petitioner.

Appeal from the United States District Court for the Northern District of Texas

(SEPTEMBER 28, 1983)

Before RUBIN and TATE, Circuit Judges, and STAGG*, District Judge.

RUBIN, Circuit Judge:

May a resident alien be denied naturalization because he was a homosexual at the time he was admitted to the United States? The district court answered this question in the affirmative. We affirm its judgment that the petitioner is ineligible for naturalization because, being excludable on the ground of his homosexuality when he arrived here, he was not lawfully admitted to the United States.

I.

Richard John Longstaff, now forty-three, is a native and citizen of the United Kingdom of Great Britain and Northern Ireland. On November 14, 1965, he was admitted to the

* District Judge of the Western District of Louisiana, sitting by designation.

United States as a permanent resident. Before he arrived in the United States, Longstaff filled out a form entitled "Application for Immigrant Visa and Alien Registration." To the question:

> 3(b) Are you now or have you ever been afflicted with psychopathic personality, epilepsy, mental defect, fits, fainting spells, convulsions or a nervous breakdown?

Longstaff answered, "No." The question was based on a provision of the Immigration & Nationality Act (the Act), 8 U.S.C. § 1182(a)(1976 & Supp. V 1981), excluding persons thus "afflicted." Congress intended the term "psychopathic personality" to designate homosexuals as well as persons having psychopathic disorders, as that term is generally understood. However, no evidence suggests that Longstaff knew or had reason to know that "psychopathic personality" was a term of art that included homosexuals and consequently excluded them from admission to the United States.[1]

Longstaff eventually settled in Texas, where he established himself in business. He owns two shops, operated under the trade name Union Jack, selling clothing and offering hairdressing services to both men and women. He has never been charged with any offense other than traffic violations. Reputable witnesses testified that they believe him to be a person of good moral character.

In his fifteenth year of residence, Longstaff sought naturalization as a citizen of the United States. He was recommended by the naturalization examiner, but the district court denied naturalization because it found that Longstaff had violated the Texas Penal Code by engaging in homosexual activity, had exhibited a lack of candor in answering questions about his sexual activities, and had failed to carry his burden of establishing good moral character as required by 8 U.S.C. § 1427(a)(3) (1976). We affirmed on appeal solely on the ground that Longstaff had failed to discharge his burden of

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[1] Indeed, Longstaff had reason to anticipate progressive social tolerance toward homosexuality. Private homosexual activity between consenting adults had recently been decriminalized in Great Britain in accordence with the recommendations of the 1963 Report of the Great Britain Committee on Homosexual Offenses and Prostitution, known as the Wolfenden Report.

proof. *In re Longstaff*, No. 79-2241 (5th Cir. Oct. 31, 1980) (per curiam) (unpublished opinion). We remanded, however, to afford Longstaff an opportunity to adduce additional evidence of his good moral character. *In re Longstaff*, No. 79-2241 (5th Cir. Dec. 11, 1980) (on rehearing) (unpublished opinion).

Thereafter, pursuant to the district court's pretrial order, an examiner for the Immigration and Naturalization Service (the INS) interrogated Longstaff. The examiner concluded that Longstaff had met his burden of establishing good moral character; nevertheless, he recommended denial of the petition because Longstaff had engaged in homosexual activity before entering the United States in 1965. He concluded that Longstaff (1) had been excludable under the Act; (2) had not been "lawfully admitted," as the Act requires for naturalization, and (3) could not be naturalized. After a trial de novo, the district court again denied Longstaff's petition for naturalization on this basis.[2]

II.

No person may be naturalized unless he has been lawfully admitted to the United States for permanent residence in accordance with all applicable provisions of the Act.[3] The applicant has the burden of proving that he entered the United States lawfully.[4] Longstaff argues that, because he was granted a visa and admitted in procedurally regular fashion, he is eligible for naturalization even if, for any reason, he should have been excluded.

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[2] The district court also held that Longstaff had failed to establish good moral character, had exhibited lack of candor before the INS and the court by answering questions about his homosexual conduct untruthfully, and had committed crimes involving moral turpitude because he had violated Texas law by engaging in homosexual acts. In view of our decision, we do not reach these questions. We note, however, that the INS did not attempt to support the trial court's conclusions on appeal: it conceded that Longstaff had met his burden of proving good moral character and it did not brief the issue of lack of candor.

[3] 8 U.S.C. § 1429 (1976).

[4] *Id.*

That narrow reading of the term "lawfully admitted" distorts its meaning. Admission is not lawful if it is regular only in form. The term "lawfully" denotes compliance with substantive legal requirements, not mere procedural regularity, as the definition provided by Congress plainly establishes: "the term 'lawfully admitted for permanent residence' means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant *in accordance with the immigration laws*, such status not having changed.[5] Section 1429's added requirement "in accordance with all applicable provisions of [the Act]" is not merely redundant, but emphatic and embracive.

The provisions concerning deportation demonstrate that what is essential is lawful status, not regular procedure. An alien is subject to deportation if "at the time of entry [he] was within one or more of the classes of aliens excludable by the law existing at the time of such entry."[6] This clause overlaps the provision for deportation of any person who "is in the United States in violation of [the Act] or in violation of any other law of the United States."[7] By providing for the deportation of excludable aliens, the Act implies that such persons, though present in the United States, were not "lawfully admitted."

The Act lists thirty-three classes of persons who are "ineligible to receive visas and shall be excluded from admission into the United States."[8] It would be paradoxical if a person who was ineligible to receive a visa and should have been excluded from admission became lawfully admitted simply because, by error, he was not excluded. We decline to read a congressional enactment so absurdly. We turn, therefore, to Longstaff's argument that he was not excludable at entry.

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[5] 8 U.S.C. § 1101(20)(1976) (emphasis added).
[6] 8 U.S.C. § 1251(a)(1) (1976).
[7] *Id.* § 1251(a)(2).
[8] *Id.* § 1182(a) (1976 & Supp. V 1981).

III.

Among the classes of aliens ineligible to receive visas and excluded from lawful admission to the United States by the Act are "aliens afflicted with psychopathic personality."[9] Before the statute in terms referred to "sexual deviation," as it now does, the Supreme Court held in Boutilier v. Immigration & Naturalization Service, 387 U.S. 118, 120, 87 S.Ct. 1563, 1565, 18 L.Ed.2d 661, 664 (1967): "The legislative history of the Act indicates beyond a shadow of a doubt that the Congress intended the phrase 'psychopathic personality' to include homosexuals. . . ."[10] Because Congress has plenary power over the admission of aliens, the Act was constitutional even if the term "psychopathic personality" did not give fair warning to the ordinary person that the phrase included homosexuals.[11] Furthermore, the Court held that the statute was constitutional because it applied to characteristics the alien possessed "at the time of his entry" and was not a sanction proscribing later conduct.[12]

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[9] 8 U.S.C. § 1182(a)(4) (1976). The Act currently provides:

(a) Except as otherwise provided in this [Act], the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

. . . .

(4) Aliens affected with psychopathic personality, sexual deviation, or a mental defect.

[10] The statute before the *Boutilier* Court read:

(a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

. . . .

(4) Aliens afflicted with psychopathic personality, epilepsy, or a mental defect.

8 U.S.C. § 1182(a)(4) (1964). Congress amended this section, substituting "sexual deviation" for "epilepsy," in 1965. Act of Oct. 3, 1965, Pub. L. No. 89-236, § 15(b), 79 Stat. 917, 919 (codified at 8 U.S.C. § 1182(a)(4) (1976)).

[11] *Boutilier*, 387 U.S. at 123-24, 87 S.Ct. at 1566-67, 18 L.Ed.2d at 665-66. A contrary holding by the Ninth Circuit led Congress to amend the statute to refer specifically to sexual deviation. S. Rep. No. 748, 89th Cong., 1st Sess. 18-19 (1965).

[12] *Id.* at 123, 87 S.Ct. at 1566, 18 L.Ed.2d at 665.

Congress has unbounded power to exclude aliens from admission to the United States.[13] Our national immigration policy was for many years based on national origin quotas that reflected racial and ethnic prejudice. Congress can bar aliens from entering the United States for discriminatory and arbitrary reasons, even those that might be condemned as a denial of equal protection or due process if used for purposes other than immigration policy to draw distinctions among people physically present within the borders of the United States.[14] The constraints of rationality imposed by the constitutional requirement of substantive due process and of nondiscrimination exacted by the equal protection component of the due process clause[15] do not limit the federal government's power to regulate either immigration or naturalization.[16] Thus, the Constitution does not require our national immigration policy to be consistent with the prohibition of discrimination by federal agencies[17] and by state governments and private persons.[18]

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[13] *See generally, Development in the Law—Imigration Policy and the Rights of Aliens*, 96 Harv. L. Rev. 1286, 1311-33 (1983); *Note, Constitutional Limits on the Power to Exclude Aliens*, 82 Colum. L. Rev. 957 (1982).

[14] *See* Plyler v. Doe, 457 U.S. 202, 210-16, 102 S.Ct. 2382, 2391-94, 72 L.Ed2d 786, 795-98 (1982) (even aliens whose presence in country is unlawful are guaranteed equal protection and due process of law by fifth and fourteenth amendments).

[15] *See* Davis v. Passman, 442 U.S. 228, 234-35, 99 S.Ct. 2264, 2271-72, 60 L.Ed.2d 846, 855-56 (1979) (fifth amendment due process clause includes equal protection guarantees); Jimenez v. Weinberger, 417 U.S. 628, 637, 94 S.Ct. 2496, 2502, 41 L.Ed.2d 363, 371 (1974) (same).

[16] Fiallo v. Bell, 430 US. U.S. 792, 97 S.Ct. 1473, 1478, 52 L.Ed.2d 50, 56 (1977); *Boutilier*, 387 U.S. at 123, Chae Chan Ping v. United States, 130 U.S. 581, 603-10, 9 S.Ct. 623, 629-31, 32 L.Ed. 1068, 1074-77 (1899). The Supreme Court recently held that the due process clause imposes a fair-procedure requirement on the exclusion of resident aliens returning from abroad. Landon v. Plasencia, U.S. , 103 S.Ct. 321, 74 L.Ed.2d 21 (1982). The decision left undisturbed, however, the Court's resolve not to interfere with substantive immigration policies adopted by Congress, regardless of community ties developed by affected aliens. *Id.* at 330. *But see Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 Harv. L. Rev. 1286, 1329 (1983) (resident alien's interest in remaining in the United States should subject deportation to substantive due-process scrutiny).

[17] Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965), *reprinted in* 42 U.S.C. § 2000e app. at 1232-26 (1976); Exec. Order No. 11,478, 34 Fed. Reg. 12,985 (1969), *reprinted in* 42 U.S.C. § 2000e app. at 1236 (1976).

[18] 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. V 1981).

Longstaff does not question any of these elementary principles. He contends that the Act does not exclude homosexuals on the basis that they are determined judicially to have such a sexual preference or even on the basis that they state that they have this preference, but that it is designed to exclude only those persons declared by a Public Health Service (PHS) medical officer to be "afflicted" with "psychopathic personality" or "sexual deviation." He premises his argument on the Act's separation of medical from other reasons for exclusion. Because the exclusion of those afflicted with psychopathic personality is contained in a clause enumerating medical bases for exclusion,[19] Longstaff argues, excludability for homosexuality must be determined in the same fashion and by the same procedures as excludability for affliction with a mental defect or a dangerous contagious disease. Because these conditions are "subject to medical determination," he contends that only a medical officer has the power to determine whether any of them exists.

The Public Health Service, in a report to the House of Representatives on the medical aspects of the House bill that later became the Immigration and Nationality Act of 1952,

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[19] The exclusion is the fourth in a list of seven medical bases for exclusion:

(1) Aliens who are mentally retarded;
(2) Aliens who are insane;
(3) Aliens who have had one or more attacks of insanity;
(4) Aliens afflicted with psychopathic personality, sexual deviation, or a mental defect;
(5) Aliens who are narcotic drug addicts or chronic alcoholics;
(6) Aliens who are afflicted with any dangerous contagious disease;
(7) Aliens not comprehended within any of the foregoing classes who are certified by the examining surgeon as having a physical defect, disease, or disability, when determined by the consular or immigration officer to be of such a nature that it may affect the ability of the alien to earn a living

. . . .

8 U.S.C. § 1182(a) (1976).

Section 1182(a) then enumerates 26 other classes of excludable aliens, *e.g.*, persons who have been convicted of a crime involving moral turpitude, polygamists, prostitutes, and anarchists. None of these classes is a medical basis for exclusion.

suggested grouping together excludable "conditions related to the field of mental disorders and subject to medical determination."[20] For a number of years thereafter, Public Health Service medical officers issued certificates declaring that aliens were excludable for homosexuality as well as for the other conditions listed in the part of the statute dealing with medical conditions.

The Surgeon General announced in 1979 that the PHS would no longer consider homosexuality a mental disease or defect because current medical standards classify homosexuality as simply a form of sexual behavior, not by itself a psychotic disorder, and because the determination that a person engages in homosexual activities is not made through a medical, diagnostic procedure.[21] Therefore, he advised INS officers to stop referring aliens to the PHS for mental examinations solely to determine whether they were homosexuals.[22]

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[20] Report of the Public Health Service on the Medical Aspects of H.R. 2379, A Bill to Revise the Laws Relating to Immigration, Naturalization, and Nationality, and for Other Purposes, *reprinted in* 1952 U.S. Code Cong. & Ad. News 1653, 1700.

In its report on the House bill that became the 1952 Act, the Public Health Service stated:

> In some instances considerable difficulty may be encountered in substantiating a diagnosis of homosexuality.... Ordinarily, a history of homosexuality must be obtained from the individual, which he may successfully cover up. Some psychological tests may be helpful in uncovering homosexuality of which the individual, himself, may be unaware. At the present time there are no reliable laboratory tests which would be helpful in making a diagnosis.

Report of the Public Health Service on the Medical Aspects of H.R. 2379, A Bill to Revise the Laws Relating to Immigration, Naturalization, and Nationality, and for Other Purposes, *reprinted in* 1952 U.S. Code Cong. & Ad. News 1653, 1701.

[21] Memorandum from Julius Richmond, Surgeon General and Assistant Secretary for Health, United States Department of Health, Education, and Welfare, to William Foege and George Lythcott (Aug. 2, 1979), *quoted in* Memorandum Opinion for the Acting Commissioner, Immigration and Naturalization Service, No. 79-85, 3 Op. Office of Legal Counsel 457, 458 (1979).

[22] The Justice Department's Office of Legal Counsel rendered an opinion that the Surgeon General lacked authority to take this step. Memorandum Opinion, *supra* note 21, at 458. This has not apparently altered the Surgeon General's position.

The Act provides that arriving aliens may be detained at the border while immigration and medical officers examine them for "physical and mental defects or disabilities" that warrant exclusion.[23] It also requires that the physical and mental examination of arriving aliens be conducted by medical officers of the United States Public Health Service or by civil surgeons employed on terms prescribed by the Attorney General.[24] These physicians "shall conduct all medical examinations and shall certify, for the information of the immigration officers and the special inquiry officers, any physical and mental defect or disease observed by such medical officers in any such alien."[25]

Longstaff urges the court to infer from the use of the word "shall" that an applicant may not be excluded for medical reasons unless the basis for exclusion is determined by a physician. He supports this argument by reference both to the past administrative practice and to the Act's declaration that a medical certificate is conclusive evidence of medical excludability.[26] Accordingly, he argues, a medical certificate is the sole type of evidence an immigration judge may consider.[27] He adds that the 1917 Act, which the 1952 Act replaced, was also construed to give conclusive effect to a medical certificate of excludability.[28] To evaluate this argument, we examine the

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[23] 8 U.S.C. § 1222 (1976).

[24] *Id.* § 1224 (Supp. V 1981).

[25] *Id.* The "special inquiry officers" are now immigration judges.

[26] 8 U.S.C. § 1226(d) (1976) provides:

> If a medical officer or civil surgeon or board of medical officers has certified . . . that an alien is afflicted . . . with any mental disease, defect, or disability which would bring such alien within any of the classes excluded from admission to the United States under paragraphs (1) to (4) or (5) of section 1182(a) of this title, *the decision of the special inquiry officer shall be based solely upon such certification. No alien shall have a right to appeal from such an excluding decision of a special inquiry officer.*

(emphasis added.) *See* United States *ex rel.* Wulf v. Esperdy, 277 F.2d 537, 538-39 (2d Cir. 1960) (per curiam).

[27] *Cf.*, In Re Hollinger, 211 F. Supp. 203, 206 (E.D. Mich. 1962) (medical certificate is only evidence on which a finding of insanity may be made in an exclusion proceeding) (dictum).

[28] United States *ex rel.* Johnson v. Shaughnessy, 336 U.S. 806, 809, 69 S.Ct. 921, 923, 93 L.Ed. 1054, 1056-57 (1949) (medical certificate conclusive on issue of excludability as mentally defective); United States *ex rel.* Saclarides v. Shaughnessy, 180 F.2d 687, 688 (2d Cir. 1950) (same).

history and structure of the Act and the procedure that must be followed by an alien who seeks to immigrate to the United States.

IV.

Homosexuals were first statutorily excluded from entry by the Immigration Act of 1917, which prohibited the admission of "persons of constitutional psychopathic inferiority" certified by a physician to be "mentally . . . defective."[29] The Immigration and Nationality Act of 1952, which repealed the 1917 Act, excluded homosexuals from entry as persons with "psychopathic personality."[30] In 1965, shortly before Longstaff was admitted, the Act was amended to delete the word "epilepsy," which had previously been included in clause (4), and to substitute "sexual deviation." *See supra* note 8. That clause, as amended, excluded "[a]liens afflicted with psychopathic personality, sexual deviation, or a mental defect"[31] at the time of Longstaff's admission, as it now still does.

When a visa was issued to Longstaff, the procedure followed, which appears not to have changed substantially, was as follows: an alien seeking admission for permanent residence in the United States was required to apply to a consular official outside of the United States for a visa. Issuing visas was the responsibility of the State Department, while examining aliens for admissibility to the United States was the duty of the INS, an arm of the Justice Department. Before the consular officer could issue the visa, the alien was required to complete an application form and to submit to physical and mental examination by a PHS officer or a designated physician.[32]

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[29] Ch. 29, § 3, 39 Stat. 874 (1917) (repealed 1952).

[30] Immigration and Nationality Act, § 212(a)(4), 66 Stat. 163 (1952).

[31] 8 U.S.C. § 1182(a)(4) (1976).

[32] *Id.* § 1201(d)(1976); 22 C.F.R. § 42.113 (1982); *see* 1A C. Gordon & H. Rosenfield, *supra* note 12, at § 3.7(g); E. Harper & R. Chase, Immigration Laws of the United States § 6(a)(3d ed. 1975).

> If the alien is retarded, insane, afflicted with psychopathic personality, sexual deviation, or a mental defect, is a drug addict or chronic alcoholic, or is afflicted with a dangerous contagious disease, the physician must issue a Class A medical certificate. 42 C.F.R. § 34.7 (1981). The consular officer must refuse the visa if the examining physician issues a Class A certificate. E. Harper & R. Chase, *supra*, at § 6(b).

The consular officer was forbidden to issue a visa if it appeared from statements in the alien's application or from the papers submitted with it that the alien was ineligible to receive a visa, hence excludable, or if the consular officer knew or had reason to believe that this was the case.[33] Thus, in the usual course of events, an alien who was excludable never received a visa. Presumably, if an applicant for a visa answered "yes" to the psychopathic personality question, he would be denied a visa. If he answered "no" but were found by the PHS officer conducting the pre-visa physical and mental examination to have such a personality, he would also be denied a visa.

Because the immigrant visa was valid for only four months,[34] the PHS officer at the port of entry usually did not make another physical or mental examination. Unless there was some reason to suspect that the alien had suffered a change in health or that the prior examination was erroneous, the domestic PHS officer merely reviewed the medical report attached to the visa.[35] An immigration officer inspected the visa and determined whether the alien was to be admitted.[36] Unless his decision was challenged by another immigration officer, the alien was admitted. The immigration officer might require the alien's sworn statements and other evidence regarding "any matter which is material and relevant to the enforcement of [the Act]," including the production of books, papers, and documents; and the testimony, under subpoena, of witnesses.[37] Any alien who "may not appear to the examining immigration officer at the point of arrival to be clearly and beyond a doubt entitled to land shall be detained for further inquiry to be conducted by [an immigration judge]."[38] That judge made the decision concerning admission.[39]

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[33] 8 U.S.C. § 1201(g)(1976).

[34] 8 U.S.C. § 1201(c)(1976).

[35] If an alien who had received a visa was re-examined upon arrival in the United States and the PHS officers concluded that the applicant suffered from a mental or physical defect, the officer certified these findings in a Class A certificate to the immigration officer. 8 U.S.C. § 1224 (Supp. V 1981). This certificate constituted the evidentiary basis for exclusion at the exclusion hearing. *Id.* § 1226(d)(1976).

[36] *Id.* § 1225.

[37] *Id.* § 1225(a).

[38] *Id.* § 1225(b).

[39] *Id.* § 1226.

Former INS immigration officers testified that, because of the procedure for issuing visas, they made no inquiry about the sexual preference of aliens arriving with a visa.[40] One former immigration officer testified that they spent an average of only 38 seconds examining each alien and his papers and that ordinarily the PHS officers merely inspected the pre-visa medical certificate to be certain that it was in order.

There is no evidence in the record regarding the procedure followed when an alien who arrived in the United States with a visa affirmatively disclosed at that time that he was a homosexual. Presumably, such a person would have been referred to a PHS medical officer for a determination of his admissibility.

As Longstaff asserts, the statute provides that the medical officer's certification of "any mental disease, defect, or disability which would bring such alien within any of the classes excluded from admission" is conclusive evidence of excludability.[41] This does not necessarily mean, however, that the absence of certification is conclusive evidence of admissibility. The Act also requires that medical officers be provided with suitable facilities for the detention and examination of all arriving aliens who are suspected of being excludable on the basis of physical or mental condition.[42] But this does not necessarily mean that such an examination is ordinarily conducted or that aliens may be excluded for medical reasons only after such an examination.

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[40] The Office of Legal Counsel stated in an opinion, "Since 1952, the exclusion of homosexual aliens has been enforced both unilaterally by the INS, e.g., *relying on an alien's admission of homosexuality*, and jointly, subsequent to a certification by the PHS that particular aliens are afflicted with a 'mental defect or disease,' e.e. homosexuality." 3 Op. Office of Legal Counsel 457 (1979)(emphasis added). The factual recitals in this opinion are not a proper subject of judicial notice. However, even in this opinion, which is relied upon by the government, there is no indication that the INS initiated any inquiry into or examination for homosexuality.

[41] 8 U.S.C. § 1226(d)(1976).

[42] *Id.* § 1224 (Supp. V 1981).

Apparently the administrative practice has been to exclude for homosexuality only those persons for whom a certificate was issued.[43] Longstaff's position that no person may be excluded absent such a certificate is also supported by Lesbian/Gay Freedom Day Committee, Inc. v. Immigration & Naturalization Service, 541 F. Supp. 569, 577-80 (N.D. Cal. 1982), *affirmed*, 714 F.2d 1470 (9th Cir. 1983),

Evaluating the extent to which this customary procedure establishes a binding precedent, we look ot the statute. The *Boutilier* Court inferred from the statute clear congressional intent to exclude persons who are homosexuals at the time they seek entry into the United States. Even if we were not bound by *Boutilier*, Congress declared its intention unmistakeably by amending the statute to bar "sexual deviates." We need not search committee reports or read legislative debates to learn the congressional mandate. The one question that remains is whether Congress ordered the exclusion of everyone it considered sexual deviates or only persons so classified at any given time by the PHS medical officer or some other physician.

If only certification of homosexuality by a medical officer could warrant exclusion of homosexuals, then the Surgeon General would have effectively checkmated Congressional policy. Confronted with the problem raised by the Surgeon General's abdication of the power he had sought from Congress, the INS initially allowed all suspected homosexuals to

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[43] See, for example, the following cases in which the INS required a medical examination and certification prior to exclusion. In re Beaton, No. A-2-486-963 (January 16, 1943); In re Lionel Colin Roberts, No. A-12-463-838 (May 20, 1964); In re Anonymous, No, A-11-065-813 (June 6, 1964); In re Jose Luis Hernandez-Gutierrez, No. A-12-633-815 (July 29, 1964); In re Norman David Flight, No. A-12-944-125 (September 1965); In re Caydem, 12 I&N Dec. 528 (1967); In re Johan Baptist Berger, No. A-10379108-New York (July 12, 1967); In re Antony Denis Hayes, No. A-12402065-Boston (March 14, 1968).

> General Counsel for the INS, David Crosland, stated in a memorandum dated February 15, 1979, to INS Commissioner Leonel Castillo, C.O. 212.3-C, 212.25-C,
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> Moreover it appears to us that every alien who is suspected of being a homosexual, and certainly this would include an individual who makes such a declaration [admission of being a homosexual] to an immigration officer, must be referred to a medical officer of the Public Health Service for examination before he may be excluded on that ground.

enter the United States under parole status while it sought counsel from the Justice Department's Office of Legal Counsel on whether it was still obligated to exclude homosexuals.[44] The Office of Legal Counsel informed the INS that it was still required to do so.[45] The opinion of the Ninth Circuit in *Lesbian/Gay Freedom Day Committee, supra*, reads the Act differently. We cannot, however, conclude that a medical certificate was indispensable to bar a professed homosexual from entry to the United States in 1965 or that obtaining such a certificate now is a prerequisite to denying naturalization.

Although the term "homosexual" is not a scientific designation, and studies indicate that many males have homosexual experiences, there can be no doubt that Longstaff both knew what the term meant and was not uncertain about his sexual preferences. He stated that he had been a homosexual "as far back as [he could] remember in [his] life." He testified that he had engaged in "homosexual activities" before his entry into the United States. He defined a homosexual experience as "going to bed with a person of the same sex, . . . in other words, sexual relations." He admitted having "deviate sexual intercourse" as defined in the Texas statute "at least a dozen times in the State of Texas." He had previously lived in Oklahoma and said he had "committ[ed] homosexual activity in Oklahoma." When asked "when did you first enter into such activities?" he answered, "I've always been a homosexual, . . . from birth." He considers himelf "now a known homosexual in the community."[46]

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[44] N.Y. Times, August 15, 1979, at A 14, col. 1.

[45] Memorandum Opinion, *supra* note 47, at 458; *see also* Note, *The Immigration and Nationality Act and the Exclusion of Homosexuals:* Boutilier v. INS *Revisited*, 2 Cardozo L. Rev. 359 (1981).

[46] *Cf.* LaVoie v. INS, 418 F.2d 732, 734 (9th Cir. 1969), *cert. denied*, 400 U.S. 854, 91 S.Ct. 72, 27 L.Ed.2d 92 (1970).

> The Boutilier case is controlling in the case before us. In both, the person ordered to be deported had frequently, over a period of years before entry engaged in homosexual acts. Each was a person who, in common opinion, would be regarded as a homosexual. The fact that one or more psychiatrists might regard such a person as having "character disorder, psychopathic or otherwise" as the petitioner's psychiatrist testified, or that another psychiatrist might regard such a person as not necessarily a homosexual, but as a sexual deviate, as the Service's psychiatrist testified, are both irrelevant, in view of the meaning which the Supreme Court in Boutilier gave to the pertinent statute.
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> *Id.* at 736.

A certificate that an alien is suffering from a medical condition that requires him to be excluded is conclusive. *See, e.g.*, United States ex rel Johnson v. Shaugnessy, 336 U.S. 806, 69 S.Ct. 921, 93 L.Ed. 1054 (1949); United States ex rel. Wulf v. Esperdy, 277 F.2d 537 (2d Cir. 1960). The statute and these decisions might well lead to the conclusion that a medical determination by a PHS officer that the alien is not suffering from such a condition is also conclusive. But neither the premise nor the inference leads to the conclusion that non-excludability is conclusively established by the absence of any examination at all.

The procedural protections build into the exclusion process demonstrate Congress's intent that only competent evidence of medical excludability be adduced in exclusion proceedings. But there is no reason why an informed applicant's admission that he falls within an excludable class is not competent evidence on which to base an exclusion decision. 8 U.S.C. § 1226(d)(1976) is not to the contrary. That section specifies that, if an immigration judge in an exclusion hearing is presented with a medical certificate "that an alien is afflicted . . . with any mental disease, defect, or disability," his decision "shall be based solely on such certification." It merely makes clear that the petitioner has no right to introduce evidence rebutting the certificate.[47] It does not expressly forbid an immigration judge to find an applicant excludable on the basis of evidence other than a medical certificate.

Although in *Boutilier*, the Public Health Service had issued a class A medical certificate stating that in the opinion of the subscribing physicians the petitioner "was afflicted with a class A condition, namely, psychopathic personality, sexual deviate" at the time of his admission, there is no indication in the opinion that the INS would have been required to ignore an admission by Boutilier that he was a homosexual. Boutilier v. INS, 387 U.S. at 120, 87 S.Ct. at 1565, 18 L.Ed.2d at 664. Likewise in *Kovacs*, the Second Circuit noted that a medical certificate had been prepared. Kovacs v. United States, 476 F.2d 843, 844 n.1 (2d Cir. 1973). These decisions indicate only that, in the past, after an alien has been admitted, the INS has obtained a class A certificate as a means of proving deportability. They do not establish that the certificate is indispensable.

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[47] *See* cases cited in *supra* note 24.

To remand the case for a medical determination of homosexuality would appear to be to ask for a certification of the obvious. It is patent that sexual preference cannot be determined by blood test or physical examination; even doctors must reach a decision by interrogation of the person involved or of others professing knowledge about that person. To require the INS to disregard the most reliable source of information, the statements of the person involved, would be to substitute secondary evidence for primary.

Longstaff contends alternatively that the fact that he was admitted to the United States bars inquiry into his excludability eighteen years ago. This argument will not bear scrutiny. As Longstaff concedes, a previously admitted alien may be deported if it is determined that he should have been excluded on any of the numerous nonmedical bases stated in the Act, such as criminal conviction or anarchy.[48] He asserts, however, that the PHS officer's failure to detect an excluding mental or physical condition is definitive.

Administrative practice and judicial precedent both disclose the error of this argument. In *Boutilier*, for example, the question of excludability for homosexuality arose nine years after the alien's admission. In numerous other cases, aliens have been deported on the basis of post-admission determinations that they should have been excluded because of physical or mental problems.[49] The Ninth Circuit affirmed an order of deportation based on petitioner's admissions and conflicting

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[48] *Accord* Alarcon-Baylon v. Brownell, 250 F.2d 45 (5th Cir. 1957) (government not estopped from deporting petitioner as draft evader, even though it issued him visa to enter as permanent resident following his draft evasion); Santiago v. Immigration & Naturalization Service, 526 F.2d 488 (9th Cir. 1975) (en banc) (government not estopped from deporting petitioners who entered United States on visas valid as they were "accompanying, or following to join" spouses or parents who, in fact, did not enter United States), *cert. denied*, 425 U.S. 971, 96 S.Ct. 2167, 48 L.Ed.2d 794 (1976). *See generally* Annot., 31 A.L.R. Fed. 900 (1977).

[49] Canciamillia v. Haff, 64 F.2d 875 (9th Cir. 1933) (epilepsy); *In re* Vallejos, 14 I. & N. Dec. 68 (1972) (leprosy); *In re* A, 8 I. & N. Dec. 12 (1958) (previous insanity); *see also In re* LaRochelle, 11 I. & N. Dec. 436, 438 (1965) (Congress intended to make deportable those who were medically inadmissible at time of entry, but who nevertheless succeeded in entering United States).

testimony of two psychiatrists because the alien was a homosexual when admitted from Canada in *LaVoie* v. *Immigration and Naturalization Service,* 418 F.2d 732 (9th Cir.1969), *cert. denied,* 400 U.S. 854, 91 S.Ct. 72, 27 L.Ed.2d 92 (1970). We affirmed a deportation order based on an alien's homosexuality without making clear whether she had been certified as a homosexual when admitted in *Quiroz* v. *Neelly,* 291 F.2d 906 (5th Cir. 1961). In several cases, the sufficiency of the evidence at a deportation hearing has been questioned.[50] To reach that question, the Board of Immigration Appeals and various courts had to assume that an alien's admissibility at the time of entry may be reconsidered.

In considering appeals from deportation orders issued on the basis of a charge that the alien was a homosexual when admitted, the Board of Immigration Appeals has remanded cases for a medical determination, stating that neither the immigration judge nor the Board has "the expertise or the authority" to determine medical admissibility.[51] In all of these appeals the grounds for medical excludability were disputed. If the alien admits the facts determining his excludability, the Board, other immigration officials, and the courts may assuredly act on the basis of that admission.[52]

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[50] *See, e.g.,* cases cited in *supra* note 43 and in *infra* note 45.

[51] *In re* Caydam, 12 I. & N. Dec. 528, 533 (1967). *See also In re* Roberts, No. A12-463-838 (May 20, 1964); Legal Opinion No. 79-7 of INS General Counsel to INS Commissioner, C.O. 212.3-C, 212.25-C. Support for this view can also be found in LeBlanc v. Bouchard, No. 1308-58 (D.N.J. 1959) (unreported); *In re* Hollinger, 211 F. Supp. 203 (E.D. Mich. 1962) (determination of insanity).

In United States ex rel Johnson v. Shaughnessy, 336 U.S. 806, 814, 69 S.Ct. 921, 925, 93 L.Ed. 1054, 1059 (1949), the Court stated:

> The ... regulations plainly prohibit the issuance of exclusion orders resting on nothing but a single episode reported by a non-Public-Health doctor. Congress has provided that before aliens suspected of mental defects are excluded, findings and conclusions shall be made by Public Health doctors based on their own examinations made in compliance with procedural safeguards defined or authorized by Congress. Medical certificates barring aliens are even then to be issued "only if the presence of such ... defect is clearly established." (citation omitted.)

[52] *In re* LaVoie, 12 I. & N. Dec. 821 (1968), *aff'd sub nom.* LaVoie v. Immigration & Naturalization Service, 418 F.2d 732 (9th Cir. 1969), *cert. denied,* 400 U.S. 854, 91 S.Ct. 72, ___ L.Ed.2d ___ (1970) (LaVoie's

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In response to the refusal of the PHS to make medical determinations of homosexuality and the determination of the office of legal counsel that the INS was nonetheless obliged to exclude homosexuals, the INS has adopted a new policy, "Guidelines and Procedures for the Inspection of Aliens Who Are Suspected of Being Homosexual."[53] This statement provides that an arriving alien will not be asked any questions regarding his sexual preference.[54] If an alien "makes an

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admission of homosexuality at time of entry meets Woodby v. Immigration and Naturalization Service, 385 U.S. 276, 87 S.Ct. 483, 17 L.Ed.2d 362 (1966), standard that ground for deportation must be proved by clear, convincing, unequivocal evidence); *In re* Steele, 12 I. & N. Dec. 302 (1967) (sustaining deportation order on ground that Steele excludable as homosexual at time of entry; to prove excludability at time of entry, INS relied on Steele's statements that he had then been homosexual); *In re* LaRochelle, 11 I. & N. Dec. 436 (1965) (LaRochelle's post-entry admission of homosexuality at time of entry supports deportation order; Board does not require medical certificate in deportation proceeding). *See also In re* S, 8 I. & N. Dec. 409 (1959) (PHS officer certified S as homosexual based on post-admission interview in which S admitted homosexuality and commission of homosexual acts); *In re* P, 7 I. & N. Dec. 258 (1956) (same).

[53] Press Release of the Department of Justice (Sept. 9, 1980). *See also* 1A C. Gordon & H. Rosenfield, *supra* note 12, § 2.38(b)(1) at 102-03 (Supp. 1983) (description of guidelines).

[54] The Application for Immigrant Visa and Alien Registration curently in use asks the applicant whether the excludable condition of sexual deviation, *inter alia*, "applies" to him and, if so, to explain. The pertinent question reads:

> United States laws governing the issuance of visas require each applicant to state whether or not he or she is a member of any class of individuals excluded from admission into the United States. The excludable classes are described below. You should read carefully the following paragraphs; your understanding of their content and the answers you give the questions that follow will assist the consular office to reach a decision on your eligibility to receive a visa.
>
> EXCEPT AS OTHERWISE PROVIDED BY LAW, ALIENS WITHIN ANY OF THE FOLLOWING CLASSES ARE INELIGIBLE TO RECEIVE AN IMMIGRANT VISA:
>
> (a) Aliens who are mentally retarded, insane, or who have suffered one or more attacks of insanity; aliens afflicted with psychopathic personality, sexual deviation, a mental defect, narcotic drug addition, chronic alcoholism, or any dangerous contagious disease; aliens who have a physical defect, disease, or disability

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unambiguous oral or written admission of homosexuality" (which does not include exhibition of buttons, literature, or other similar material), or if a third person who is also presenting himself for inspection "voluntarily states, without prompting or prior questioning, that an alien who arrived in the United States at the same time . . . is a homosexual," the alien may be examined privately by an immigration officer and asked to sign a statement that he is a homosexual. That statement forms the evidentiary basis for exclusion.

Thus, the administrative agency charged with enforcement of the Act has interpreted it as not requiring a medical certificate as a condition for the exclusion of homosexuals. This interpretation is entitled to deference.[55]

That homosexuality is no longer considered a psychopathic condition is established by the opinion of the government's highest medical officer, the Surgeon General. We are bound, nonetheless, by *Boutilier*'s ruling that the phrase "psychopathic personality," is a term of art, not dependent on medical

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affecting their ability to earn a living; aliens who are paupers, professional beggars, or vagrants; aliens convicted of a crime involving moral turpitude or who admit committing the essential elements of such a crime, or who have been sentenced to confinement for at least 5 years in the aggregate for conviction of two or more crimes; aliens who are polygamists, or who practice or advocate polygamy; aliens who are prostitutes, or who have engaged in, benefited financially from, procured, or imported persons for the purpose of prostitution, or who seek entry to the United States to engage in prostitution or other commercialized vice, or any immoral sexual act; aliens who seek entry to perform skilled or unskilled labor and who have not been certified by the Secretary of Labor; and aliens likely to become a public charge in the United States.

Do any of the foregoing classes apply to you? Yes ___ No ___ (if answer is Yes, explain)

[55] *See* Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 100 S.Ct. 790, 63 L.Ed.2d 22 (1980); Kaneb Services, Inc. v. Federal Savings & Loan Insurance Corp., 650 F.2d 78, 83 n.13 (5th Cir. 1981); K. Davis, Administrative Law Treatise § 29.00-6 (1982 Supp.).

definition,[56] and by the congressional bar against persons "afflicted with . . . sexual deviation." Homosexuality can now be demonstrated in INS proceedings only by an alien's unambiguous admission or by the voluntary statement of a third person, made without either prompting or questioning. Longstaff is thus barred from naturalization by his own truthful statements that he was excludable as a homosexual at the time of his entry, and, therefore, was not lawfully admitted for permanent residence.[57] There is no evidence that, when he sought a visa eighteen years ago, he was asked any question that would indicate to him or to any other intelligent layman that his sexual preferences might affect the issuance of a visa, or that he knowingly gave a false answer to any question asked of him. In the eighteen years of his residence, he has led a constructive life. We are, however, bound to decide according to a law made in the exercise of a power that is plenary. If Congress's policy is misguided, Congress must revise that policy. If the result achieved by the policy is unfair to a deserving person who desires to become a citizen, the injustice must be corrected by lawmakers.

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[56] Judge Aguilar concluded in *Lesbian/Gay Freedom Day Committee, Inc.*, 541 F. Supp. at 585, that, "*Boutilier* does not preclude the Court from finding that Congress did not intend that homosexuals be excluded from entry into the United States solely because they are homosexuals once medical authorities have determined that homosexuality is not a medical illness, mental disorder, or sexual deviation, and the Court so finds this to be the congressional intent." We disagree with this interpretation of *Boutilier* and of Congressional intent. Quiroz v. Neelly, 291 F.2d 906, 907 (5th Cir. 1961). Like the Supreme Court, we look behind the technical phrases in the Act to the purpose of its drafters. Congress clearly intended to exclude homosexuals from entry into the United States and its use of medical language to describe the excludable class was not intended to lay down a clinical test for exclusion, dependent on the vicissitudes of medical opinion. *Boutilier*, 387 U.S. at 122, 87 S.Ct. at 1566, 18 L.Ed.2d at 665. Indeed, although Congress employed medical terminology to describe the excludable class, it is evident that moral as well as medical reasons underlay the congressional decision to exclude homosexuals. *Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 Harv. L. Rev. 1286, 1346 & nn. 92-94 (1983). Nor do we agree with Judge Aguilar that Congress's decision is subject to constitutional challenge. 541 F. Supp. at 585 n.8. The Constitution vests in Congress—not the courts—plenary decisionmaking authority over the admission of aliens into the United States. Congress's decision that a class of aliens is excludable is not reviewable by the judicial branch. *Fiallo*, 430 U.S. at 792 & n.4, 97 S.Ct. at 1478 & n.4, 52 L.Ed.2d at 56 & n.4.

[57] *In re* Jasso, No. 204019 (N.D. Cal. Oct. 9, 1975) and *In re* Brodie, 394 F. Supp. 1208 (D. Or. 1975) both involved petitions for naturalization under 8 U.S.C. § 1440 (1976 & Supp. V 1981), which waives lawful

(Footnote continued on following page)

Based on the finding that Longstaff was a homosexual when he entered the United States, the district court correctly decided that he was then excludable, that his excludability may now be proved, and that, being excludable, he may not be naturalized.[58] Therefore, its judgment is AFFIRMED.

Dissenting Opinion

TATE, Circuit Judge:

The majority has certainly reached a logical conclusion, based upon its intelligent analysis of applicable legislation and jurisprudential authority, that the petitioner Longstaff may be denied naturalization in 1983 because, when he was admitted to the United States in 1965 (following which he has led a constructive life), he was a homosexual and thus could have

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(Footnote continued from previous page)

admission, periods of residency, physical presence, and nondeportability as conditions for naturalization. For this reason, the district courts in *Jasso* and *Brodie* considered only whether the petitioners had met their burden of proving good moral character. Longstaff, however, must meet the lawful-admission and nondeportability requirements.

Contrary to our decison, however, is *In re* Labady, 326 F. Supp. 924 (S.D. N.Y. 1971). Although Labady had made known to immigration officials at the time of his entry that he was homosexual, he was not medically certified as a "sexual deviate" or a "psychopathic personality." The district court observed, "Since [Labady] validly entered the country without deceit, the Service concedes that he is not now deportable." *Id.* at 926. The court characterized Labady, without discussion, as "lawfully admitted," *id.* at 925, and addressed only the issue whether Labady had established his good moral character. In dictum, the Second Circuit distinguished *Labady* from the case of a homosexual whose petition for naturalization was denied because he failed to prove good moral character. Kovacs v. United States, 476 F.2d 843 (2d Cir. 1973). Kovacs had not been candid under oath about his sexual activities. The Second Circuit suggested, "Had Kovacs testified truthfully about his past, the petition might well have been granted." *Id.* at 845 (footnote omitted). Because we interpret the statute as requiring a petitioner for naturalization to have been lawfully admitted, we cannot agree with this suggestion.

[58] We consider only whether Longstaff was lawfully admitted in 1965; we express no opinion about any matter not raised as an issue in this case. Therefore, we do not expatiate on whether the same result would be statutorily compelled or constitutionally permissible in deportation proceedings, a concern addressed by the dissent.

been excluded from admission to the United States. The majority therefore concludes that Longstaff was not "lawfully admitted" to the United States, a prerequisite for naturalization.

I respectfully dissent. For the reasons extensively detailed by the Ninth Circuit recently in Hill v. United States Immigration and Naturalization Service, 714 F.2d 1470 (9th Cir. 1983), I would conclude that a homosexual may not lawfully be denied admission in the absence of a medical certificate to that effect.

I premise my conclusion on the peculiar statutory framework at issue in this case. As the majority states, Congress listed "psychopathic personality" and "sexual deviation" as causes for exclusion in a list of seven medical bases for exclusion. *See*, 8 U.S.C. § 1182(a)(1976). This list of medical causes for exclusion is further supplemented by twenty-six other non-medical bases for exclusion. *Id.* Furthermore, 8 U.S.C. § 1224 provides that either medical officers of the Public Health Service or civil surgeons employed by the United States "*shall*" conduct the physical and mental examination of all aliens suspected of being medically excludable under § 1182(a)(1)-(5), (thus including the grounds of psychopathic personality and sexual deviation). These medical personnel and surgeons are the only persons authorized by the Act to certify the existence of "*any*" medical condition permitting exclusion.[1]

Therefore, the statutory scheme contemplates that medical personnel will diagnose and certify any *medical* cause for deportation or exclusion. Moreover, as the majority concedes, the apparent practice of the Immigration and Naturalization

[1] § 1224 of the Act provides that:

> The physical and mental examination of arriving aliens (including alien crewmen) shall be made by medical officers of the United States Public Health Service, who shall conduct all medical examinations and shall certify, for the information of the immigration officers and the special inquiry officers, any physical and mental defect or disease observed by such medical officers in any such alien. If medical officers of the United States Public Health Service are not available, civil surgeons of not less than four years' professional experience may be employed for such service upon such terms as may be prescribed by the Attorney General. • • •

Service (the "INS") has been "to exclude for homosexuality only those persons for whom a [medical] certificate was issued." 716 F. 2d 1446.

Nonetheless, the majority concludes that Congress did not intend for a medical certificate attesting to an individual's homosexuality to be the only competent evidence for exclusion on the basis of "psychopathic personality" or "sexual deviation." To the contrary, however, I do not believe that it is overly formalistic to find that Congress did intend in its statutory scheme to *require* medical certification, and only medical certification, of any "medical" cause for exclusion. In this context, it must be remembered that the statute provides that an alien in the United States may be deported if he "at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of [his] entry" into the United States. 8 U.S.C. § 1251(a)(1).

In my view, Congress intended to avoid not only an initial exclusion from admission, but also an ex post facto determination for deportation puposes, from being based solely on the non-medical judgment of bureaucratic agencies that a "medical" cause for exclusion existed at the time of a person's admission, when that determination is unsupported by a professional judgment by a member of the medical profession. This interpretation is further supported when, as here, the medical condition is indefinite and arguable (or, *e.g.*, where a condition was latent at the time of entry and undiscoverable *then* by a medical examination); then, medical conditions that allegedly existed at the time of presumably lawful admission could later be administratively misused to deport persons unpopular in actuality for non-medical reasons. Thus, I believe that Congress intended the medical certification procedure to be interposed as an important safeguard against abusive "medical" exclusions or deportations by introducing the independent factor of a professional medical examination into this aspect of the exclusion and deportation process.

Nor does my reading of Congress' intent differ because homosexuality is no longer recognized by medical experts to be a psychopathic condition. As the majority notes, we are bound

by the Supreme Court's ruling in *Boutilier* v. *Immigration and Naturalization Service*, 387 U.S. 118, 87 S.Ct. 1563 (1967), to the effect that homosexuality is a "medical" condition then included within the phrase "psychopathic personality." *Id.* And since this ruling is apparently not dependent on current medical opinion, *Boutilier*, *supra*, 387 U.S. at 124, 87 S.Ct. at 1567, I can see no reason to treat homosexuality differently from the other grounds for medical exclusion.

Thus, exclusion or deportation on grounds of homosexuality must be subject to the same safeguards of medical certification as exclusion or deportation on other medical grounds such as "mental retardation" or "mental defect." Just as Congress was unwilling to rely on a bureaucratic determination that a person has a "mental defect",[2] the *statute* clearly suggests that Congress was equally unwilling to accept a nonmedical determination that a person has a "psychopathic personality" because of homosexuality (the test of lawful admission at the time of Longstaff's entry). The importance of adhering to the congressional intent that only professional medical determinations be made, so as to avoid the improper non-medical administrative classification of a person as "medically" excludable or deportable, requires that the courts respect these stringent statutory standards by not creating procedural exceptions only for certain "medical" conditions.

The INS argues that it should not be required to produce medical certification of homosexuality for exclusion or deportation purposes since such certification is now difficult to obtain. In particular, the INS contends that it should be allowed to rely on other forms of evidence under the statute, because the PHS, pursuant to an order by the Surgeon General, has refused since 1979 to medically disgnose and certify that an individual is a homosexual.

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[2] No more, I believe, did Congress intend to allow agents of the Immigration and Naturalization Service to exclude or deport aliens solely on the basis of a self-admission that "I have a mental defect" or "I have had an attack of insanity" or "I am a moron", which are some of the other causes for medical exclusion under the Act. Under the statutory scheme, Congress simply did not intend to permit a non-medical determination as to the existence of "medical" causes for exclusion or deportation, including "psychopathic personality" and "sexual deviation."

It is basic, however, that this court is without authority to ignore the mandate of Congress' statutory scheme merely because there is an interagency dispute over the mechanics of statutory enforcement. If this administrative dispute renders the exclusion of homosexuals under the statute ineffective, then it is for Congress, not this Court, to alter its statutory scheme requiring medical certification. Absent such congressional intervention, I am unwilling to infer that Congress intended to allow the non-medical personnel of an administrative agency to use "medical" classifications—as is the practice in present-day Russia—to exile persons for newly-discovered mental defects or other "medical conditions."

Thus, I agree with the Ninth Circuit in *Hill, supra,* that Congress did so intend to treat medical causes for exclusion or deportation differently from non-medical causes for denial of lawful admission to the United States, and that we must respect the intended illogic of Congress in according such talismanic significance to the presence or absence of a conclusive medical certification as determinative of admissibility or deportability.

One final word. The issue before us appears to be simply whether or not the petitioner Longstaff is entitled to naturalization. As the authorities cited by the majority show, however, if the majority's reasoning is correct, not only is naturalization deniable to Longstaff, but also Longstaff is subject to deportation many, many years after his presumably lawful entry to the United States and his constructive life here.

Of far greater importance than Longstaff's unfortunate individual plight, and the rather simple factual issues presented by it, is the subjection to deportation of all other persons against whom a governmental agency may assert as a reason for deportation—perhaps (as in the case of Longstaff) many years after a presumably lawful entry into the United States—a newly discovered pre-admission "medical" cause for exclusion from entry. This is especially troublesome when the medical condition is one in the diagnosis of which medical experts may differ, and in which medical "diagnosis" as to whether or not the condition existed at time of entry may be wholly speculative. The continued stay in the United States as a resident alien

of an individual such as Longstaff (and his eligibility for naturalization) is thus made dependent on the uncertainties and indefiniteness of medical science (as hypothesized by medical and psychiatric expert witnesses) as to a "medical" condition and whether it existed or not at the time of entry.

This spectre, and the avoidance of the possibility of abuse of bureaucratic deportation powers, is what I believe the Congress intended to avoid by conclusively fixing a professionally certified medical cause for exclusion from lawful admission by the showing made as to it at the time of admission to the United States.

U.S. COURT OF APPEALS
FILED
OCT 27 1983
GILBERT F. GANUCHEAU, Clerk

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 82-1218

IN THE MATTER OF:
PETITION FOR NATURALIZATION OF
RICHARD JOHN LONGSTAFF,
Petitioner.

Appeal from the United States District Court for the Northern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 9/28/83, 5 Cir., 198 , ____F.2d____)

(OCTOBER 27, 1983)

Before RUBIN and TATE, Circuit Judges, and STAGG*, District Judge.

PER CURIAM:

(x) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

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CONSTITUTION

ARTICLE I

Section 8. The Congress shall have Power

To establish an uniform Rule of Naturalization,

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

§ 1101. Definitions

(a) As used in this chapter—

(20) The term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

§ 1182. Excludable aliens—General classes

(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

(1) Aliens who are mentally retarded;

(2) Aliens who are insane;

(3) Aliens who have had one or more attacks of insanity;

(4) Aliens afflicted with psychopathic personality, or sexual deviation, or a mental defect;

(5) Aliens who are narcotic drug addicts or chronic alcoholics;

(6) Aliens who are afflected with any dangerous contagious disease;

(7) Aliens not comprehended within any of the foregoing classes who are certified by the examining surgeon as having a physical defect, disease, or disability, when determined by the consular or immigration officer to be of such a nature that it may affect the ability of the alien to earn a living, unless the alien affirmatively establishes that he will not have to earn a living;

§ 1201. Issuance of visas—Immigrants; nonimmigrants

PHYSICAL EXAMINATION

(d) Prior to the issuance of an immigrant visa to any alien, the consular officer shall require such alien to submit to a physical and mental examination in accordance with such regulations as may be prescribed. Prior to the issuance of a nonimmigrant visa to any alien, the consular officer may require such alien to submit to a physical or mental examination, or both, if in his opinion such examination is necessary to ascertain whether such alien is eligible to receive a visa.

§ 1222. Detention of aliens for observation and examination upon arrival

For the purpose of determining whether aliens (including alien crewmen) arriving at ports of the United States belong to any of the classes excluded by this chapter, by reason of being afflicted with any of the diseases or mental or physical defects or disabilities set forth in section 1182(a) of this title, or whenever the Attorney General has received information showing that any aliens are coming from a country or have embarked at a place where any of such diseases are prevalent or epidemic, such aliens shall be detained on board the vessel or at the airport of arrival of the aircraft bringing them, unless the Attorney General directs their detention in a United States immigration station or other place specified by him at the expense of such vessel or aircraft except as otherwise provided in this chapter, as circumstances may require or justify, for a sufficient time to enable the immigration officers and medical officers to subject such aliens to observation and an examination sufficient to determine whether or not they belong to the excluded classes.

§ 1224. Physical and mental examinations; appeal of findings

The physical and mental examination of arriving aliens (including alien crewmen) shall be made by medical officers of the United States Public Health Service, who shall conduct all medical examinations and shall certify, for the information of the immigration officers and the special inquiry officers, any physical and mental defect or disease observed by such medical officers in any such alien. If medical officers of the United States Public Health Service are not available, civil surgeons of not less than four years' professional experience may be employed for such service upon such terms as may be prescribed by the Attorney General. Aliens (including alien crewmen) arriving at ports of the United States shall be examined by at least one such medical officer or civil surgeon under such administrative regulations as the Attorney General may prescribe, and under medical regulations prepared by the Surgeon General of the United States Public Health Service.

Medical officers of the United States Public Health Service who have had special training in the diagnosis of insanity and mental defects shall be detailed for duty or employed at such ports of entry as the Attorney General may designate, and such medical officers shall be provided with suitable facilities for the detention and examination of all arriving aliens who it is suspected may be excludable under paragraphs (1) to (4) or (5) of section 1182(a) of this title, and the services of interpreters shall be provided for such examination. Any alien certified under paragraphs (1) to (4) or (5) of section 1182(a) of this title, may appeal to a board of medical officers of the United States Public Health Service, which shall be convened by the Surgeon General of the United States Public Health Service, and any such alien may introduce before such board one expert medical witness at his own cost and expense.

§ 1225. Inspection by Immigration Officers—Powers of officers

(a) The inspection, other than the physical and mental examination, of aliens (including alien crewmen) seeking admission or readmission to or the privilege of passing through the United States shall be conducted by immigration officers, except as otherwise provided in regard to special inquiry officers. All aliens arriving at ports of the United States shall be examined by one or more immigration officers at the discretion of the Attorney General and under such regulations as he may prescribe. Immigration officers are authorized and empowered to board and search any vessel, aircraft, railway car, or other conveyance, or vehicle in which they believe aliens are being brought into the United States. The Attorney General and any immigration officer, including special inquiry officers, shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, pass through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the administration of the Service, and, where such action may be necessary, to make a written record of such evidence. Any person coming into the United States may be required to state under oath the purpose or purposes for which

he comes, the length of time he intends to remain in the United States, whether or not he intends to remain in the United States permanently and, if an alien, whether he intends to become a citizen thereof, and such other items of information as will aid the immigration officer in determining whether he is a national of the United States or an alien and, if the latter, whether he belongs to any of the excluded classes enumerated in section 1182 of this title. The Attorney General and any immigration officer, including special inquiry officers, shall have power to require by subpena the attendance and testimony of witnesses before immigration officers and special inquiry officers and the production of books, papers, and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the administration of the Service, and to that end may invoke the aid of any court of the United States. Any United States district court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer or special inquiry officer may, in the event of neglect or refusal to respond to a subpena issued under this subsection or refusal to testify before an immigration officer or special inquiry officer, issue an order requiring such persons to appear before an immigration officer or special inquiry officer, produce books, papers, and documents if demanded, and testify, and any failure to obey such order of the court may be punished by the court as a contempt thereof.

Detention for further inquiry; challenge of favorable decision

(b) Every alien (other than an alien crewman), and except as otherwise provided in subsection (c) of this section and in section 1323(d) of this title, who may not appear to the examining immigration officer at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for further inquiry to be conducted by a special inquiry officer. The decision of the examining immigration officer, if favorable to the admission of any alien, shall be subject to challenge by any other immigration officer and such challenge shall operate to take the alien, whose privilege to land is so challenged, before a special inquiry officer for further inquiry.

Temporary exclusion; permanent exclusion by Attorney General

(c) Any alien (including an alien crewman) who may appear to the examining immigration officer or to the special inquiry officer during the examination before either of such officers to be excludable under paragraphs (27), (28), or (29) of section 1182(a) of this title shall be temporarily excluded, and no further inquiry by a special inquiry officer shall be conducted until after the case is reported to the Attorney General together with any such written statement and accompanying information, if any, as the alien or his representative may desire to submit in connection therewith and such an inquiry or further inquiry is directed by the Attorney General. If the Attorney General is satisfied that the alien is excludable under any of such paragraphs on the basis of information of a confidential nature, the disclosure of which the Attorney General, in the exercise of his discretion, and after consultation with the appropriate security agencies of the Government, concludes would be prejudicial to the public interest, safety, or security, he may in his discretion order such alien to be excluded and deported without any inquiry or further inquiry by a special inquiry officer. Nothing in this subsection shall be regarded as requiring an inquiry before a special inquiry officer in the case of an alien crewman.

§ 1226. Exclusion of aliens—Proceedings

(a) A special inquiry officer shall conduct proceedings under this section, administer oaths, present and receive evidence, and interrogate, examine, and cross-examine the alien or witnesses. He shall have authority in any case to determine whether an arriving alien who has been detained for further inquiry under section 1225 of this title shall be allowed to enter or shall be excluded and deported. The determination of such special inquiry officer shall be based only on the evidence produced at the inquiry. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he

shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer under this section shall be conducted in accordance with this section, the applicable provisions of sections 1225 and 1357(b) of this title, and such regulations as the Attorney General shall prescribe, and shall be the sole and exclusive procedure for determining admissibility of a person to the United States under the provisions of this section. At such inquiry, which shall be kept separate and apart from the public, the alien may have one friend or relative present, under such conditions as may be prescribed by the Attorney General. A complete record of the proceedings and of all testimony and evidence produced at such inquiry, shall be kept.

Appeal

(b) From a decision of a special inquiry officer excluding an alien, such alien may take a timely appeal to the Attorney General, and any such alien shall be advised of his right to take such appeal. No appeal may be taken from a temporary exclusion under section 1225(c) of this title. From a decision of the special inquiry officer to admit an alien, the immigration officer in charge at the port where the inquiry is held may take a timely appeal to the Attorney General. An appeal by the alien, or such officer in charge, shall operate to stay any final action with respect to any alien whose case is so appealed until the final decision of the Attorney General is made. Except as provided in section 1225(c) of this title such decision shall be rendered solely upon the evidence adduced before the special inquiry officer.

Finality of decision of special inquiry officers

(c) Except as provided in subsections (b) or (d) of this section, in every case where an alien is excluded from admission into the United States, under this chapter or any other law or treaty now existing or hereafter made, the decision of a special inquiry officer shall be final unless reversed on appeal to the Attorney General.

Physical and mental defects

(d) If a medical officer or civil surgeon or board of medical officers has certified under section 1224 of this title that an alien is afflicted with a disease specified in section 1182(a)(6) of this title, or with any mental disease, defect, or disability which would bring such alien within any of the classes excluded from admission to the United States under paragraphs (1) to (4) or (5) of section 1182(a) of this title, the decision of the special inquiry officer shall be based solely upon such certification. No alien shall have a right to appeal from such an excluding decision of a special inquiry officer. If an alien is excluded by a special inquiry officer because of the existence of a physical disease, defect, or disability, other than one specified in section 1182(a)(6) of this title, the alien may appeal from the excluding decision in accordance with subsection (b) of this section, and the provisions of section 1183 of this title may be invoked.

§ 1251. Deportable aliens—General classes

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

§ 1427. Requirements of naturalization—Residence

(a) No person, except as otherwise provided in this subchapter, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing his petition for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his petition has been physically present therein for periods totaling at least half of that time, and who has resided within the State in which the petitioner filed the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the period referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.

Absences

(b) Absence from the United States of more than six months but less than one year during the period for which continuous residence is required for admission to citizenship, immediately preceding the date of filing the petition for naturalization, or during the period between the date of filing the petition and the date of final hearing, shall break the continuity of such residence, unless the petitioner shall establish to the satisfaction of the court that he did not in fact abandon his residence in the United States during such period.

Absence from the United States for a continuous period of one year or more during the period for which continuous residence is required for admission to citizenship (whether preceding or subsequent to the filing of the petition for naturalization) shall break the continuity of such residence, except that in the case of a person who has been physically present and residing in the United States, after being lawfully admitted for permanent residence, for an uninterrupted period of at least one

year, and who thereafter is employed by or under contract with the Government of the United States or an American institution of research recognized as such by the Attorney General, or is employed by an American firm or corporation engaged in whole or in part in the development of foreign trade and commerce of the United States, or a subsidiary thereof more than 50 per centum of whose stock is owned by an American firm or corporation, or is employed by a public international organization of which the United States is a member by treaty or statute and by which the alien was not employed until after being lawfully admitted for permanent residence, no period of absence from the United States shall break the continuity of residence if—

(1) prior to the beginning of such period of employment (whether such period begins before or after his departure from the United States), but prior to the expiration of one year of continuous absence from the United States, the person has established to the satisfaction of the Attorney General that his absence from the United States for such period is to be on behalf of such Government, or for the purpose of carrying on scientific research on behalf of such institution, or to be engaged in the development of such foreign trade and commerce or whose residence abroad is necessary to the protection of the property rights in such countries in such firm or corporation, or to be employed by a public international organization of which the United States is a member by treaty or statute and by which the alien was not employed until after being lawfully admitted for permanent residence; and

(2) such person proves to the satisfaction of the court that his absence from the United States for such period has been for such purpose.

Physical presence

(c) The granting of the benefits of subsection (b) of this section shall not relieve the petitioner from the requirement of physical presence within the United States for the period specified in subsection (a) of this section, except in the case of those persons who are employed by, or under contract with, the Government of the United States. In the case of a person employed by or under contract with Central Intelligence Agency, the requirement in subsection (b) of this section of an uninterrupted period of at least one year of physical presence in the United States may be complied with by such person at any time prior to filing a petition for naturalization.

Moral character

(d) No finding by the Attorney General that the petitioner is not deportable shall be accepted as conclusive evidence of good moral character.

Same; determination

(e) In determining whether the petitioner has sustained the burden of establishing good moral character and the other qualifications for citizenship specified in subsection (a) of this section, the court shall not be limited to the petitioner's conduct during the five years preceding the filing of the petition, but may take into consideration as a basis for such determination the petitioner's conduct and acts at any time prior to that period.

Restrictions

(f) Naturalization shall not be granted to a petitioner by a naturalization court while registration proceedings or proceedings to require registration against an organization of which the petitioner is a member or affiliate are pending under section 792 or 793 of Title 50.

§ 1429. Prerequisite to naturalization; burden of proof

Except as otherwise provided in this subchapter, no person shall be naturalized unless he has been lawfully admitted to the United States for permanent residence in accordance with all applicable provisions of this chapter. The burden of proof shall be upon such person to show that he entered the United States lawfully, and the time, place, and manner of such entry into the United States, but in presenting such proof he shall be entitled to the production of his immigrant visa, if any, or of other entry document, if any, and of any other documents and records, not considered by the Attorney General to be confidential, pertaining to such entry, in the custody of the Service. Notwithstanding the provisions of section 405(b) of this Act, and except as provided in sections 1439 and 1440 of this title no person shall be naturalized against whom there is outstanding a final finding of deportability pursuant to a warrant of arrest issued under the provisions of this chapter or any other Act; and no petition for naturalization shall be finally heard by a naturalization court if there is pending against the petitioner a deportation proceeding pursuant to a warrant of arrest issued under the provisions of this chapter or any other Act: *Provided*, That the findings of the Attorney General in terminating deportation proceedings or in suspending the deportation of an alien pursuant to the provisions of this chapter, shall not be deemed binding in any way upon the naturalization court with respect to the question of whether such person has established his eligibility for naturalization as required by this subchapter.

SIXTY-FOURTH CONGRESS. SESS. II. CH. 29. 1917.

CHAP. 29.—An Act To regulate the immigration of aliens to, and the residence of aliens in, the United States.

SEC. 16. That the physical and mental examination of all arriving aliens shall be made by medical officers of the United States Public Health Service who shall have had at least two years' experience in the practice of their profession since receiving the degree of doctor of medicine, and who shall conduct all medical examinations and shall certify, for the information of the immigration officers and the boards of

special inquiry hereinafter provided for, any and all physical and mental defects or diseases observed by said medical officers in any such alien; or, should medical officers of the United States Public Health Service be not available, civil surgeons of not less than four years' professional experience may be employed in such emergency for such service upon such terms as may be prescribed by the Commissioner General of Immigration, under the direction or with the approval of the Secretary of Labor. All aliens arriving at ports of the United States shall be examined by not less than two such medical officers at the discretion of the Secretary of Labor, and under such administrative regulations as he may prescribe and under medical regulations prepared by the Surgeon General of the United States Public Health Service. Medical officers of the United States Public Health Service who have had special training in the diagnosis of insanity and mental defects shall be detailed for duty or employed at all ports of entry designated by the Secretary of Labor, and such medical officers shall be provided with suitable facilities for the detention and examination of all arriving aliens in whom insanity or mental defect is suspected, and the services of interpreters shall be provided for such examination. Any alien certified for insanity or mental defect may appeal to the board of medical officers of the United States Public Health Service, which shall be convened by the Surgeon General of the United States Public Health Service, and said alien may introduce before such board one expert medical witness at his own cost and expense. That the inspection, other than the physical and mental examination, of aliens, including those seeking admission or readmission to or the privilege of passing through or residing in the United States, and the examination of aliens arrested within the United States under this Act, shall be conducted by immigrant inspectors, except as hereinafter provided in regard to boards of special inquiry. All aliens arriving at ports of the United States shall be examined by at least two immigrant inspectors at the discretion of the Secretary of Labor and under such regulations as he may prescribe. Immigrant inspectors are hereby authorized and empowered to board and search for aliens any vessel, railway car, or any other conveyance, or vehicle in which they believe aliens are being brought into the United States. Said inspectors

shall have power to administer oaths and to take and consider evidence touching the right of any alien to enter, reenter, pass through, or reside in the United States, and, where such action may be necessary, to make a written record of such evidence; and any person to whom such an oath has been administered, under the provisions of this Act, who shall knowingly or willfully give false evidence or swear to any false statement in any way affecting or in relation to the right of any alien to admission, or readmission to, or to pass through, or to reside in the United States shall be deemed guilty of perjury and be punished as provided by section one hundred and twenty-five of the Act approved March fourth, nineteen hundred and nine, entitled "An Act to codify, revise, and amend the penal laws of the United States." All aliens coming to the United States shall be required to state under oath the purposes for which they come, the length of time they intend to remain in the United States, whether or not they intend to abide in the United States permanently and become citizens thereof, and such other items of information regarding themselves as will aid the immigration officials in determining whether they belong to any of the excluded classes enumerated in section three hereof. Any commissioner of immigration or inspector in charge shall also have power to require by subpoena the attendance and testimony of witnesses before said inspectors and the production of books, papers, and documents touching the right of any alien to enter, renter, reside in, or pass through the United States, and to that end may invoke the aid of any court of the United States; and any district court within the jurisdiction of which investigations are being conducted by an immigrant inspector may, in the event of neglect or refusal to respond to a subpoena issued by any commissioner of immigration or inspector in charge or refusal to testify before said immigrant inspector, issue an order requiring such person to appear before said immigrant inspector, produce books, papers, and documents if demanded, and testify; and any failure to obey such order of the court may be punished by the court as a contempt thereof. That any person, including employees, officials, or agents of transportation companies, who shall assault, resist, prevent, impede, or interfere with any immigration official or employee

in the performance of his duty under this Act shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by imprisonment for a term of not more than one year, or by a fine of not more than $2,000, or both; and any person who shall use any deadly or dangerous weapon in resisting any immigration official or employee in the performance of his duty shall be deemed guilty of a felony and shall, on conviction thereof, be punished by imprisonment for not more than ten years. Every alien who may not appear to the examining immigrant inspector at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry. In the event of rejection by the board of special inquiry, in all cases where an appeal to the Secretary of Labor is permitted by this Act, the alien shall be so informed and shall have the right to be represented by counsel or other adviser on such appeal. The decision of an immigrant inspector, if favorable to the admission of any alien, shall be subject to challenge by any other immigrant inspector, and such challenge shall operate to take the alien whose right to land is so challenged before a board of special inquiry for its investigation.

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No. 83-1229

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

RICHARD JOHN LONGSTAFF, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER

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I. PRELIMINARY STATEMENT.

This supplemental brief corrects a significant factual misstatement in respondent's brief in opposition to the petition for certiorari, and treats with respondent's eleventh hour attempt to eliminate by voluntary and selective cessation a plain and square conflict between the Fifth and Ninth Circuits. When all is said and done, certiorari should be granted to resolve the continuing enforcement problems presented by INS's ad hoc policy changes.

II. RESPONDENT'S SUGGESTION THAT PETITIONER "VOLUNTEERED" INFORMATION IS UNTRUE.

Although respondent represents to the Court that petitioner "volunteered the information [regarding prior homosexual experience]" and would have the Court believe that petitioner has brought the sanctions of denial of citizenship and possible deportation upon himself, the record is clear that petitioner never voluntarily disclosed his sexual orientation. Rather, he resisted such inquiry by the Immigration and Naturalization Service (hereinafter "INS") and admitted to some homosexual experience only after the INS "wanted to know everything" and had reminded petitioner that he had "a burden in these proceedings." Respondent states to the Court:

> "Petitioner suggests (Pct. 12) that if homosexuals may be excluded on the basis of their own admission, 'aliens entering the United States as tourists can be labeled "homosexual," "insane," or "mentally retarded," without the medical certificate required by the Act[.]' This suggestion, however, ignores the most salient fact of this case, and distorts the

> enforcement procedure currently employed by the INS for the exclusion of homosexual aliens. Petitioner has not been 'labeled "homosexual"' in some arbitrary or random fashion by the INS; his excludability on that ground is an issue only because he volunteered the information" [emphasis added] (Response No. 9, footnotes).

This statement is not only false, but when viewed in light of the record of proceedings of which respondent is in full and complete possession, it deceives the Court as to the actual means by which petitioner's alleged homosexuality became an issue.

Petitioner repeatedly and strenuously objected to all questions relating to his sexual preference and refused to answer such questions. Although not represented by counsel, petitioner steadfastly maintained that his sexual preference was a private matter and not the business of respondent. In pertinent part, the transcript of the preliminary examination, which took place at the INS offices in Dallas, Texas, on March 31, 1977 reads as follows:

> "Q: On January 13, 1977, you were interviewed by Mr. James A. Curry. Is that correct?
>
> "A: That's correct.
>
> "Q: When Mr. Curry interviewed you, he asked you if you had ever had any homosexual experience or something to that affect. What did you tell him?
>
> "A: Well, I denied it. I didn't feel he had the right to ask me this question. It wasn't on the application form. I also felt I had my own moral standards of conduct and therefore, I preferred to refuse to answer but since they wanted to know everything, finally I did answer that yes I have had some homosexual experience.
>
> "Q: I'd like to know something about the frequency of such actions or relationships or experiences. About how often would you say you have such an

experience?

"A: I prefer not to answer that questions.

"Q: Well, I do want to remind you that you do have a burden as I indicated before in these proceedings.

"A: I've told enough about my personal life already.

"Q: I want to make sure you know what the question is. You've already stated that you've had such experiences. Right?

"A: Yes.

"Q: The question is how often?

"A: I decline to answer that question.

"Q: Let me rephrase it. Would you say it's at least once every three months?

"A: No, I wouldn't like to answer that question.

"A: I feel I've given more than enough information. How could it possibly be relavent [sic] to my application to becoming an American citizen? Here again, I protest this line of questioning. I don't feel anybody has the right to peak [sic] through my bedroom curtains.

"Q: Well, we're certainly not trying to peak [sic] through your bedroom curtains and I'm not asking for any of the lurid details, I'm only asking you a simple question...

"A: You're asking about my sex life, that's what you're asking.

"Q: Not of you [sic] sex life but of your homosexual activities.

"A: This is the same thing as sex.

"Q: Would you be willing to give an estimate of the number of experiences that you've had during the last five years?

"A: No, I would not" (pp. 9- 11).

Respondent's characterization of petitioner's statements as "voluntary" admissions within the meaning of respondent's current "enlightened" guidelines ("unsolicited, unambiguous oral or written admission of homosexuality" (Pet. 12)) is simply an untrue representation to this Court.

III. RESPONDENT'S SELECTIVE, AD HOC CHANGE OF POLICY CURES NOTHING.

Similarly, the eleventh hour bureaucratic maneuvering by Acting Deputy Attorney General Jensen cannot resolve the dispute between the Ninth and Fifth Circuits. On June 13, 1979, Carl Hill, a British subject, carrying a valid visitor's visa, attempted to enter the United States at San Francisco International Airport. Mr. Hill wore a button containing the statement "Gay Pride." As a result, INS officers sought to have Mr. Hill examined by a PHS psychiatrist and certified as being afflicted with "a psychopathic personality or sexual deviation." Mr. Hill filed an action against the PHS to enjoin a statutorily unauthorized, non-medical examinations, of the type Mr. Jensen and respondent now seek to implement in the Ninth Circuit. On June 26, 1979, the United States District Court for the Northern District of California entered a temporary restraining order against the PHS (see Hill v. Richmond (N.D.Cal. 1979) Civil No. 79-1405 S.A.W.). By stipulation that order was continued until trial, which was set for August 13, 1979. On August 2, 1979, in

response to Mr. Hill's case, the Surgeon General directed PHS physicians to cease performing examinations and issuing certificates where the alien was suspected solely of being homosexual per se. The Surgeon General's directive mooted Mr. Hill's case.

Respondent suggests that Mr. Jensen's letter will cause the Public Health Service (hereinafter "PHS") to violate the Surgeon General's August 2, 1979 directive, the clear direction of Congress embodied in statute and the ethics of the medical profession. Respondent is naive. Moreover, if respondent believes the courts would permit the resumption of these examinations, respondent seriously underestimates the courts' commitment to due process of law and their antagonism towards INS's willingness to change its policies from Circuit to Circuit and case to case as suits its purposes. It is a policy "shell game" that will repeat itself until review is granted. It is time to bring INS to book.

If, on the other hand, respondent knows that Mr. Jensen's letter will not cause the resumption of the examinations, then petitioner submits that the letter is merely a subterfuge to mislead this Court into believing that there is no significant conflict between the Circuits and that there is no need to examine the conduct of an agency that arrogates to itself

the right to make law when the express directives of Congress become inconvenient or unsatisfactory.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was properly denied naturalization because he acknowledged that he was a homosexual at the time he entered the United States and therefore was not "lawfully admitted" as required by 8 U.S.C. 1427(a)(1).

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The September 28, 1983 opinion of the court of appeals (Pet. App. A35-A60) is reported at 716 F.2d 1439. The March 25, 1982 opinion of the district court (Pet. App. A28-A34) is reported at 538 F. Supp. 589. The October 31, 1980 opinion of the court of appeals (Pet. App. A12-A14) is not reported. The March 9, 1979 opinion of the district court (Pet. App. A10-A11) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 1983. A petition for rehearing was denied on October 27, 1983 (Pet. App. A61). The petition for a writ of certiorari was filed on January 25, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act of 1952 provides that certain "classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States." 8 U.S.C. 1182(a). Among these classes are "[a]liens afflicted with psychopathic personality, sexual deviation, or a mental defect." 8 U.S.C. 1182(a)(4). Homosexuals are within the coverage of this provision. *Boutilier* v. *INS*, 387 U.S. 118 (1967); *Hill* v. *INS*, 714 F.2d 1470, 1472 n.1 (9th Cir. 1983).

The Act also establishes procedures to be followed when aliens seek admission into the United States Aliens suspected of being excludable on the grounds specified in Section 1182(a) may be detained upon arrival "for a sufficient time to enable the immigration officers and medical officers to subject [them] to observation and an examination sufficient to determine whether * * * they belong to the excluded classes." 8 U.S.C. 1222. When a physical or mental examination is deemed appropriate, it is conducted by "medical officers of the United States Public Health Service, who * * * shall certify, for the information of the immigration officers * * *, any physical and mental defect or disease observed." 8 U.S.C. 1224. If such a certification is given, "the decision of the special inquiry officer shall be based solely upon such certification." 8 U.S.C. 1226(d). Even when an examination is not conducted and a certification is not provided, however, "the burden of proof shall be upon [an alien seeking admission] to establish that he * * * is not subject to exclusion under any provision of [the Act]." 8 U.S.C. 1361.

Once an alien is "lawfully admitted" into the United States and has resided continuously for at least five years, he may file a petition for naturalization. 8 U.S.C. 1427(a)(1). As in exclusion proceedings, "[t]he burden of proof shall be

upon [the alien] to show that he entered the United States lawfully." 8 U.S.C. 1429.

2. Petitioner was admitted to the United States as a permanent resident on November 14, 1965 (Pet. App. A17). The Application for Immigrant Visa and Alien Registration that he filled out before arriving asked (Pet. App. A36 (citation omitted)):

> Are your now or have you ever been afflicted with psychopathic personality, epilepsy, mental defect, fits, fainting spells, convulsions or a nervous breakdown?

Congress intended the phrase "psychopathic personality" to include homosexuals.[1] Apparently unaware of the significance of the term, petitioner answered "No." Petitioner was also examined by the Public Health Service (PHS) at the time of his entry, but no basis for exclusion was observed, and no certificate issued. Pet. App. A30-A31, A36; Pet. 4.

On September 19, 1975, petitioner applied for citizenship (Pet. App. A29). In the course of the naturalization proceedings petitioner freely testified that he had been a homosexual " 'as far back as [he could] remember' " and that he had " 'always been a homosexual, . . . from birth' " (*id.* at A48 (citation omitted; brackets in original)). Petitioner also testified about his participation in homosexual activities before and after his arrival in the United States (*id.* at A20,

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[1]The phrase "psychopathic personality" appearing in 8 U.S.C. 1182(a)(4) was originally intended by Congress to include homosexuals. *Boutilier* v. *INS*, 387 U.S. 118, 120 (1967). On October 3, 1965, Congress amended that section and added the phrase "sexual deviation" to make its purpose clearer. Act of Oct. 3, 1965, Pub. L. No. 89-236, § 15(b), 79 Stat. 919; S. Rep. 748, 89th Cong., 1st Sess. 19 (1965). Although petitioner was admitted to the United States a month later, the form quoted in text was filled out prior to his arrival (Pet. App. A36).

A48), concluding that he considered himself " 'now a known homosexual in the community' " (*id.* at A48 (citation and footnote omitted)).

On the basis of this testimony the United States District Court for the Northern District of Texas originally denied naturalization because petitioner had failed to carry his burden of establishing good moral character, as required by 8 U.S.C. 1427(a)(3), and had exhibited a lack of candor in answering questions (Pet. App. A10-A11). The court of appeals affirmed on the former ground (*id.* at A12-A14), but on petition for rehearing remanded to give petitioner a chance to adduce additional evidence of his good character (*id.* at A16). On remand the district court reaffirmed its original decision, adding that petitioner was in any event not entitled to naturalization because he had been excludable under 8 U.S.C. 1182(a)(4) and therefore had not been "lawfully admitted" to the United States (Pet. App. A28-A34).

3. The court of appeals affirmed (Pet. App. A35-A60). Petitioner contended there that, even though he may have been excludable, he had been granted a visa and admitted in a procedurally regular fashion, and so was eligible for naturalization. The court rejected that contention: "Admission is not lawful if it is regular only in form. The term 'lawfully' denotes compliance with substantive legal requirements, not mere procedural regularity" (Pet. App. A38). The Immigration and Naturalization Service's failure to detect an excluding mental or physical condition at the time of admission, the court held, does not bar further inquiry into the subject in the course of naturalization proceedings (*id.* at A50-A51).

Petitioner alternatively argued that homosexuals were not excludable under 8 U.S.C. 1182(a)(4) unless they had been examined and certified by PHS doctors in accordance with 8 U.S.C. 1224. Because no certificate had been issued

in his case, petitioner continued, he was not excludable, and therefore was eligible for naturalization. The court of appeals found no basis for this argument in the Act. 8 U.S.C. 1224 does say that Public Health Service officers "shall conduct all medical examinations and shall certify" the existence of any defects they find. But that does not mean that examinations are the only means of ascertaining homosexuality (Pet. App. A43-A46). Similarly, the provision in the Act making a medical certification conclusive evidence of excludability (8 U.S.C. 1226(d)) does not mean that excludability cannot be shown by other means (Pet. App. A46). Indeed, the court observed (*id.* at A50):

> To remand the case for a medical determination of homosexuality would appear to be to ask for a certification of the obvious. It is patent that sexual preference cannot be determined by blood test or physical examination; even doctors must reach a decision by interrogation of the person involved or of others professing knowledge about that person. To require the INS to disregard the most reliable source of information, the statements of the person involved, would be to substitute secondary evidence for primary.

The court of appeals found support for its conclusion in the interpretation given the Act by the INS, the administrative agency charged with its enforcement (Pet. App. A53). In 1979 the Surgeon General of the United States announced that the PHS would no longer conduct examinations of aliens for homosexuality, since homosexuality was not a mental disorder, nor could it be ascertained through medical diagnostic procedures (*id.* at A42). The INS has nevertheless continued to exclude self-proclaimed homosexuals

without either examination or certification by the PHS (*id.* at A52-A53).[2]

ARGUMENT

The decision of the court of appeals is plainly correct. While the court's reasoning conflicts with the Ninth Circuit's decision in *Hill* v. *INS*, 714 F.2d 1470 (1983), the difference is insignificant as a practical matter and will not result in inconsistent enforcement of the Act. The petition should therefore be denied.

1. The court of appeals' decision correctly construes the Immigration and Nationality Act. 8 U.S.C. 1429 states that

> no person shall be naturalized unless he has been lawfully admitted to the United States for permanent residence in accordance with all applicable provisions of this chapter. The burden of proof shall be upon such person to show that he entered the United States lawfully * * *.

Among the "provisions of this chapter" to which Section 1429 refers is the restriction found in 8 U.S.C. 1182(a):

> [T]he following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * * * *
>
> (4) Aliens afflicted with psychopathic personality, sexual deviation, or a mental defect * * *.

Section 1182(a)(4) unquestionably was intended to exclude homosexuals from admission. See S. Rep. 748, 89th Cong., 1st Sess. 18-19 (1965); *Boutilier* v. *INS*, 387 U.S. 118, 120 (1967).

---

[2]Judge Tate dissented (Pet. App. A55-A60). In his view, "a homosexual may not lawfully be denied admission in the absence of a medical certificate to that effect" (*id.* at A56).

It is frivolous to suggest that petitioner has carried the burden of proof imposed on him by 8 U.S.C. 1429 when he himself admits that he has " 'always been a homosexual, . . . from birth' " (Pet. App. A48 (citation omitted)). Cf. *Boutilier* v. *INS*, 387 U.S. at 122-123 ("we do not now disturb that finding, especially since petitioner admitted being a homosexual at the time of his entry"). Even in this Court petitioner does not dispute the lower courts' conclusion that he is now a homosexual and was one at the time he entered the United States. Nor does petitioner contend that a medical examination — either by a PHS officer or by a doctor of his own choice — would produce a contrary finding.[3]

Petitioner contends, however, relying on 8 U.S.C. 1224-1226, that a determination of excludability (for homosexuality) can only rest on a PHS medical certification, and that none was issued in his case (Pet. 7-8). But nothing in those Sections or elsewhere in the Act states that a medical

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[3]It is true that petitioner — notwithstanding the restriction in Section 1182(a) — was admitted to the United States as a permanent resident in 1965. But that fact, as the court of appeals correctly noted, is not conclusive on the question of petitioner's excludability in a subsequent naturalization proceeding (Pet. App. A50-A51). Cf. *Fedorenko* v. *United States*, 449 U.S. 490, 514-515 (1981) (denaturalization); *Boutilier* v. *INS*, 387 U.S. at 119-120 (deportation); *Canciamilla* v. *Haff*, 64 F.2d 875, 876 (9th Cir. 1933) (deportation); *In re La Rochelle*, 11 I. & N. Dec. 436, 438 (1965) (deportation). No dispute about petitioner's homosexuality arose at the time of his admission, in large part because he answered "No" to the question on his visa application designed to elicit information about that issue. The INS's failure to discover petitioner's condition during his pre-visa medical examination or at the time of his arrival is unsurprising, given the cursory nature of those procedures and the type of exclusion involved. See Pet. App. A46 (INS officers "spent an average of only 38 seconds examining each alien and his papers"); *Santiago* v. *INS*, 526 F.2d 488 (9th Cir. 1975) (en banc), cert. denied, 425 U.S. 971 (1976) (INS not estopped in deportation case even where immigration officer at port of entry should have recognized that entry was unlawful).

examination and certification are required in order to exclude self-proclaimed homosexuals. Section 1224 simply requires that when an examination is conducted it must be done by PHS officers, and that if they observe any "defect or disease" they must so certify to the immigration and special inquiry officers. Section 1225(a) empowers

> [t]he Attorney General and any immigration officer, including special inquiry officers, * * * to take and consider evidence of or from any person touching the privilege of any alien * * * to enter * * * or reside in the United States or concerning any matter which is material and relevant to the enforcement of this chapter * * *.

It would be odd if, in the course of taking such evidence, the INS were required to ignore the alien's own admission that he fell within one of the classes Congress wished to exclude.[4] Finally, Section 1226(d) states that when a certification is issued under Section 1224 it shall be deemed conclusive. But nothing in Section 1226(d) makes certification the *only* method by which excludability may be shown.[5]

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[4]It is well settled that an agency may dispense even with those fact-finding procedures that are statutorily required in cases where the facts are not in dispute. See, *e.g.*, *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 620-621 (1973); *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956).

[5]The cases cited by petitioner (Pet. 8-10 & nn. 3-4) (with the exception of *Hill* v. *INS, supra*) are not inconsistent with this understanding of the statute. In *United States ex rel. Johnson* v. *Shaughnessy*, 336 U.S. 806, 813 (1949), the alien "emphatic[ally] deni[ed] any condition which could justify her classification as a mental defective." In *Kovacs* v. *United States*, 476 F.2d 843, 845 (2d Cir. 1973), the court denied naturalization to an alleged homosexual because of "doubts as to [his] truthfulness at the initial hearing." In *United States ex rel. Wulf* v. *Esperdy*, 277 F.2d 537 (2d Cir. 1960), the court held that the alien was excludable under 8 U.S.C. 1182(a)(6) on the basis of a medical certificate. *In re Labady*, 326 F. Supp. 924 (S.D.N.Y. 1971), involved the issue whether an alien who had engaged in homosexual activities within five

Congress itself recognized, in passing the Immigration and Nationality Act, that "considerable difficulty may be encountered in substantiating a diagnosis of homosexuality." The reason for this conclusion was that "there are no reliable laboratory tests which would be helpful in making [the] diagnosis." H.R. Rep. 1365, 82d Cong., 2d Sess. 47 (1952) (Report of the Public Health Service on the Medical Aspects of H.R. 2379). But if Congress entertained doubts about the special ability of doctors to identify homosexuals, it is hard to believe that it would have insisted on a medical examination and certification in cases where more reliable evidence was volunteered by the alien himself. Indeed, both

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years of the date of his petition was "a person of good moral character" within the meaning of 8 U.S.C. 1427(a)(3) — an issue not addressed by the court of appeals in this case (Pet. App. A55 n.58). Finally, *In re Hollinger*, 211 F. Supp. 203, 205 (E.D. Mich. 1962), was a case in which the alien apparently contested the issue of her insanity, and in which in any event the court found that the Board of Immigration Appeals had "expressly waived this disability."

Petitioner suggests (Pet. 12) that if homosexuals may be excluded on the basis of their own admissions, "aliens entering the United States as tourists can be labeled 'homosexual,' 'insane,' or 'mentally retarded,' without the medical certification required by the Act[.]" This suggestion, however, ignores the most salient fact of this case, and distorts the enforcement procedure currently employed by the INS for the exclusion of homosexual aliens. Petitioner has not been "labeled 'homosexual' " in some arbitrary or random fashion by the INS; his excludability on that ground is an issue only because he volunteered the information. As we explain below, page 12, that is now the *only* way in which homosexual aliens entering the country are identified. It may be that for some—perhaps most—personality disorders and mental defects, the individual's own statements are not as reliable as a medical certification and should not suffice as grounds for exclusion. Cf. *United States ex rel. Saclarides* v. *Shaughnessy*, 180 F.2d 687 (2d Cir. 1950) (mongolism); *In re Hollinger, supra* (schizophrenia); *United States ex rel. Johnson* v. *Shaughnessy, supra* (mental defective); *United States ex rel. Wulf* v. *Esperdy, supra* (tuberculosis). Petitioner, by contrast, is a mature, articulate, and acknowledged homosexual. His condition, unlike mongolism or schizophrenia, for example, in no way bears on his capacity for self-assessment.

Congress and the PHS acknowledged when the Act was passed that "[o]rdinarily, a history of homosexuality must be obtained from the individual" (*ibid.*).[6]

These explicit statements by the Congress that passed the Act demonstrate convincingly the essential meaninglessness of the rule for which petitioner argues. Petitioner "does not question the substantive issue of whether Congress intended to exclude homosexual aliens" under 8 U.S.C. 1182(a)(4). See Pet. 7. Petitioner also does not deny that he is a homosexual and was one at the time he entered the United States, in violation of Section 1182(a)(4). Neither does he contend that a medical examination would produce a contrary finding. If such an examination were ordered, the doctor's conclusion would be based on precisely the same admissions petitioner has already volunteered in the course of his naturalization proceedings. No laboratory tests would be conducted. Congress believed in 1952 that "[s]ome psychological tests may be helpful in uncovering homosexuality of which the individual, himself, may be unaware." H.R. Rep. 1365, *supra*, at 47. But see page 11, *infra*. Whether or not that is so, such tests would be superfluous in petitioner's case. In short, petitioner's only argument is that he is entitled to have a doctor certify second hand, based on petitioner's own statements, what petitioner has already testified to in person. It is frivolous to suggest that Congress conditioned exclusion on the performance of such a redundant exercise.

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[6]Accordingly, it has not been the practice of the INS to insist on a certification in cases of self-proclaimed homosexuals. The Office of Legal Counsel, after studying that very issue, recently noted that "[s]ince 1952, the exclusion of homosexual aliens has been enforced both unilaterally by the INS, *e.g., relying on an alien's admission of homosexuality* and jointly, subsequent to a certification by the PHS that particular aliens are afflicted with a 'mental defect or disease,' *i.e.*, homosexuality." 3 Op. Off. of Legal Counsel 457, 457-458 (1979) (emphasis added).

2. The court of appeals acknowledged that, in holding that self-proclaimed homosexuals could be excluded without a certificate from the PHS, it was disagreeing with a contrary decision of the Ninth Circuit in *Hill* v. *INS, supra* (Pet. App. A47, A54 n.56). We concede that this case and *Hill* conflict on the issue of the excludability of uncertified but self-proclaimed homosexuals. We nevertheless believe that the issue is too insignificant to warrant certiorari, particularly in light of the steps the government has taken in response to *Hill* to ensure evenhanded enforcement of the immigration law.

a. On August 2, 1979, the Surgeon General announced that PHS personnel would no longer issue medical certificates in cases where aliens referred to them were suspected of being homosexual. That action was taken for two reasons. First, the Surgeon General determined that according to " 'current and generally accepted canons of medical practice' " homosexuality is no longer properly characterized as a mental disorder. *Hill* v. *INS*, 714 F.2d at 1472 (quoting 56 Interpreter Releases 387, 398 (1979)). Second, " 'the determination of homosexuality is not made through a medical diagnostic procedure' " (714 F.2d at 1473).

In response, the INS initially allowed suspected homosexuals to enter the country conditionally on parole status. See 8 U.S.C. 1182(d)(5).[7] On September 9, 1980, the INS adopted new Guidelines and Procedures for the Inspection of Aliens Who Are Suspected of Being Homosexual (App.

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[7]INS consulted the Office of Legal Counsel, which concluded that the Surgeon General had no authority to determine that homosexuality is not a mental defect or disease for purposes of applying the Immigration and Nationality Act, though he could determine as a matter of fact that referral of aliens to the PHS for certification of homosexuality would be unhelpful. The Office of Legal Counsel opinion concluded by suggesting that INS promulgate a uniform policy for investigating suspected homosexuals. *Hill* v. *INS*, 714 F.2d at 1473.

A, *infra*, 1a-2a). The Guidelines state that an arriving alien will not be asked any questions about his or her sexual preference.[8] Only if the alien "makes an unsolicited, unambiguous oral or written admission of homosexuality," or if a third person who is also presenting himself for inspection "voluntarily states, without prompting or prior questioning, that an alien who arrived in the United States at the same time * * * is a homosexual," will the alien be examined privately by an immigration official and asked to sign a statement declaring that he or she is a homosexual (App. A, *infra*, 1a-2a). The exhibition of buttons, literature, or other similar material does not qualify as the kind of "unambiguous * * * admission of homosexuality" that will permit further examination (*ibid.*). Moreover, when the alien is examined privately he is asked "*only* whether he or she is homosexual. If the answer is 'no', the alien shall not be detained for further examination" (*id.* at 2a (emphasis in original)). The Guidelines specifically state that "[n]o search * * * is to be performed for the purpose of seeking evidence of homosexuality" (*ibid.*).

If the arriving alien admits during private examination to being a homosexual, a hearing is held before an immigration judge and the alien is excluded based on his admission. No medical certificate is obtained. *Hill* v. *INS*, 714 F.2d at 1473. The effect of the INS's current policy is that an arriving homosexual alien will be excluded only if he wishes to make an issue of the current enforcement policy, by repeatedly proclaiming his homosexuality at the time of entry.

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[8]The application for Immigrant Visa and Alien Registration does continue to ask, in accordance with the statute (8 U.S.C. 1182(a)(4)), whether the excludable condition of "sexual deviation" applies to the applicant (Pet. App. A52-A53 n.54).

b. In *Hill* v. *INS, supra,* the alien, a subject of Great Britain, presented himself as a nonimmigrant visitor for pleasure at San Francisco International Airport. Although he possessed a valid visitor's visa, Hill made an unsolicited statement to the immigration inspector that he was a homosexual. The inspector then issued Hill a form notifying him that he appeared to be excludable under 8 U.S.C. 1182(a)(4). At the exclusion hearing Hill again stated that he was a homosexual and acknowledged his earlier statement to the INS officer.

The Ninth Circuit held that, despite Hill's several admissions that he fell within an excludable category of aliens, Hill could not be excluded because the PHS had not issued a medical certificate attesting to his homosexuality. Like petitioner, the Ninth Circuit believed that 8 U.S.C. 1224, 1225 and 1226(d) require exclusions to be based on medical examination and certification. 714 F.2d at 1474-1475.[9] The court of appeals in *Hill* found support for this belief in the legislative history, which showed that "Congress and the PHS thought, at the time of the adoption of the Act, that homosexuality was diagnosable" (*id.* at 1476).[10] The Ninth Circuit did not say exactly what was to be done during the examination it prescribed, nor what medical evidence would support the issuance of a certificate. It stressed only that the examination was to be "meaningful" (*id.* at 1479) and "made solely by trained physicians" (*id.* at 1475).

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[9]The Ninth Circuit did acknowledge, however, that "[t]he Act does not explicitly state that a medical certificate is required for exclusion under 8 U.S.C. § 1182(a)(4)." 714 F.2d at 1474.

[10]As we pointed out above, pages 9-10, *supra*, it may be doubted whether Congress or the PHS in fact entertained such a belief even in 1952. In any event it is a non-sequitur to argue, as the Ninth Circuit did (714 F.2d at 1476), that because latent homosexuality can be diagnosed, repeated, unsolicited admissions of homosexuality must be ignored in exclusion proceedings.

c. We of course disagree with the Ninth Circuit's decision in *Hill* for the same reasons we oppose petitioner's claim that he is not excludable and hence is entitled to citizenship. The Solicitor General nevertheless has decided not to seek certiorari in *Hill*, because the number of aliens who will be admitted pursuant to that decision (and who otherwise would be excluded) is likely to be trifling. Under the INS's current policy of asking no questions about the sexual preference of arriving aliens, and of excluding only those who volunteer admissions of their homosexuality (or who admit to being homosexuals after having been identified by someone entering simultaneously), the only homosexuals who are excluded are those who insist on making an issue of their homosexuality.[11]

It is true that if the PHS were to continue declining to issue certificates in the Ninth Circuit, there would be a minor inconsistency in the enforcement of the immigration law: homosexuals entering in the Ninth Circuit could announce their homosexuality to the INS and still be admitted, while those entering in the Fifth Circuit would have to refrain from volunteering such statements. That difference would hardly be worthy of plenary review by this Court. In order to make the enforcement of the immigration law as uniform as possible, however, the Acting Deputy Attorney General, by letter dated April 5, 1984, has instructed the Assistant Secretary for Health in the Department of Health and Human Services to conform PHS practices to the decision in *Hill*. The letter states (App. B, *infra*, 3a-4a):

> [I]n order for the Immigration and Naturalization Service to carry out its congressionally mandated responsibility in the Ninth Circuit, you are required to

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[11]We are informed by the INS that in 1981 only one such person was excluded after a formal hearing. In 1982 no alien was excluded.

> instruct the Public Health Service to resume the process for issuance of the certificates referred to in 8 U.S.C. 1224 for self-proclaimed homosexual aliens seeking admission in the Ninth Circuit who are referred by the Immigration and Naturalization Service to a Public Health Service officer for examination.

Thus self-proclaimed homosexuals — the only group against whom the statutory direction in 8 U.S.C. 1182(a)(4) ("sexual deviation") is now effectively enforced — will in the future be excluded in both the Fifth and Ninth Circuits, as well as elsewhere. The only difference is that in the Ninth Circuit the exclusion will be based on a PHS certification (8 U.S.C. 1226(d)) issued on the strength of the alien's own admissions (App. B, *infra*, 4a), while in the rest of the country the exclusion will rest on the ground that the alien, by virtue of his voluntary acknowledgement of an excludable characteristic, has failed to sustain his burden of proving admissibility (8 U.S.C. 1361). Either ground is, of course, a sufficient basis for exclusion under the Immigration and Nationality Act.

We wish to emphasize that the resulting difference in enforcement between the Ninth Circuit and the rest of the country is purely a procedural one, not affecting the substantive rights of any alien. The Ninth Circuit did not hold that homosexuality is not a basis for exclusion under the Act. 714 F.2d at 1472 n. 1. The only disagreement among the circuits concerns the proper method for proving a fact that is not disputed—the homosexuality of entering aliens who proclaim themselves to be homosexuals. Though it is senseless to conduct a medical examination at all under these circumstances, cf. *Codd* v. *Velger*, 429 U.S. 624, 627 (1977), doing so in the Ninth Circuit will have little impact on the government's enforcement responsibilities, and none on the outcome of any exclusion proceeding. For that reason, and in order to remove all effects of the conflict with

this case (and therefore any possible need for review by this Court of this otherwise inconsequential issue), we have decided to follow the procedures required by *Hill* in excluding self-proclaimed homosexuals in the Ninth Circuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

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MAY 1984

DOJ-1984-05

APPENDIX A

The policy cable cited August 14, 1979 regarding the inspection of an alien suspected of being excludable solely on the basis of being homosexual is rescinded. Operations instructions are amended as follows: 235.15 - *guidelines and procedures for the inspection of aliens who are suspected of being homosexual.*

1. Prior to August 2, 1979, this Service's procedure concerning the inspection of an alien believed to be a homosexual was to refer that individual to a medical officer of the United States Public Health Service for a medical examination. Effective that date, the Surgeon General instructed Public Health Service officers not to accept immigration referrals when the sole basis for the referral was to establish homosexuality as a mental disease or defect. His decision was based upon the American Psychiatric Association's determination that homosexuality is no longer considered to be a mental disorder.

2. The intent of Congress to include homosexuals within the terms of Section 212(a)(4) has been established by the legislative history of the 1952 enactment and its 1965 amendment, as well as the Supreme Court's interpretation of the 1952 Act, (*Boutilier* v. *I & NS*, 387 U.S. 118 (1967)). The Department of Justice, Office of Legal Counsel, has determined that where non-medical evidence establishes homosexuality, the INS is not required to refer the alien to the United States Public Health Service for examination.

3. *Primary Inspection* - an alien shall not be asked any questions concerning his or her sexual preference during primary inspection.

4. *Referral to Secondary Inspection* - an alien shall be referred to secondary inspection for examination as to homosexuality only under the following circumstances: (1) when an alien makes an unsolicited, unambiguous oral or

written admission of homosexuality. Buttons, literature or other materials referring to "gay rights" or describing or supporting homosexuality shall not be considered unambiguous admissions of homosexuality. (2) When a third party who presents him or herself for inspection voluntarily states without prompting or prior questioning that an alien who arrived in the United States at the same time and is then being processed for admission is a homosexual. You should note that the likelihood of a third-party stating that an alien is homosexual is remote.

5. *Secondary Inspection* - an alien referred to secondary inspection for examination as to homosexuality shall be questioned privately. Inspectors must perform their duties in a professional manner and not allow personal beliefs to taint the inspection of the alien. An alien referred under paragraph 4 shall be asked *only* whether he or she is homosexual. If the answer is "no", the alien shall not be detained for further examination as to homosexuality. If the answer is "yes", the alien shall be asked to sign a statement to that effect. Whether or not the alien executes a statement, he or she shall be referred to an immigration judge for an exclusion proceeding in accordance with 8 CFR 235.6, or when appropriate, to the district Director for processing under 8 CFR 235.7

6. No search under Section 287(c) is to be performed for the purpose of seeking evidence of homosexuality.

APPENDIX B

April 5, 1984

Dr. Edward N. Brandt, Jr., M.D.
Assistant Secretary for Health
Department of Health and Human Services
200 Independence, S.W.
Room 716G
Washington, D.C. 20201

Dear Dr. Brandt:

The Solicitor General has determined that the government will not file a petition for a writ of certiorari to review the decision of the Ninth Circuit in *Hill* v. *Immigration and Naturalization Service*, 714 F.2d 1470 (1983).

Hill, which establishes the law applicable in the Ninth Circuit, holds that the Immigration and Naturalization Service may not exclude an alien under 8 U.S.C. 1182(a)(4) based solely on the alien's unsolicited admission of homosexuality to an immigration official, and that a medical certificate issued by the Public Health Service certifying the alien to be homosexual is required. As you know, Congress intended homosexuality to be one of the grounds for exclusion under that section of the Immigration and Nationality Act. Even though the Immigration and Naturalization Service does not question entrants about their sexual preference, it has a statutory responsibility to exclude self-proclaimed homosexuals.

Accordingly, in order for the Immigration and Naturalization Service to carry out its congressionally mandated responsibility in the Ninth Circuit, you are required to instruct the Public Health Service to resume the process for issuance of the certificate referred to in 8 U.S.C. 1224 for

self-proclaimed homosexual aliens seeking admission in the Ninth Circuit who are referred by the Immigration and Naturalization Service to a Public Health Service officer for examination. We do not read the law to require, in such circumstances, that the certificate be based on anything other than the alien's own statement of homosexuality.

Your cooperation in this matter is appreciated.

Sincerely,

D. Lowell Jensen
Acting Deputy Attorney General